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No. 03-9659

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

THOMAS JOE MILLER-EL,

Petitioner,

v.

DOUG DRETKE, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT APPENDIX VOLUME II OF II

GENA BLOUNT BUNN
Counsel of Record
ASSISTANT ATTORNEY GENERAL
CAPITAL LITIGATION DIVISION
OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548, Capital Stn.
Austin, TX 78711-2548
(512) 936-1600

Counsel for Respondent

JIM MARCUS
Counsel of Record
TEXAS DEFENDER SERVICE
412 Main Street
Suite 1150
Houston, TX 77002
(713) 222-7788

SETH P. WAXMAN
DAVID W. OGDEN
JONATHAN G. CEDARBAUM
BRUCE L. GOTTLIEB
WILMER CUTLER PICKERING HALE AND DORR LLP
2445 M Street, N.W.
Washington, DC 20037
(202) 663-6000

Counsel for Petitioner

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[55] CYNTHIA KAY YOUNG,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Good morning, Ms. Young. My name is Paul Macaluso and to my immediate left is Jim Nelson. You may recall yesterday there was another gentleman who was seated right where I'm pointing now and his name is Norman Kinne. Norman, Jim and I are assistant criminal district attorneys here in Dallas and we represent the State of Texas in this particular case. We're the lawyers for the State.

To Jim's immediate left is Mr. Brice Cunningham and to Mr. Cunningham's immediate left is Royce West. They're the lawyers who have been appointed to represent the accused Defendant in this case and his name is Thomas Joe Miller-El. He's seated to their immediate left in the light blue suit over there. Can you see him from where you're sitting?

* * * *

[59] with your personal feelings about anything. You understand the very serious nature of what we're about here today and I think you understand why we absolutely need to know some things about your background and how you feel generally?

A Yes, sir.

Q Now, let me start off by telling you exactly what the State's position is in this case. The Judge foreshadowed some of this yesterday. We are actively seeking the death penalty in this case for Mr. Miller-El. I just want to put you on notice of that right at the very beginning so you will know exactly where the State stands with regard to this case and this Defendant because we intend to be able to provide a jury, once it's selected—and, of course, that would mean you, if you're on the jury, and eleven others—with both the type and the quality of evidence that would convince them in the

first part of the trial beyond any reasonable doubt whatsoever that that man is guilty exactly as he is charged in this indictment and nothing less.

In the second phase of the trial, **[60]** once again, to be able to provide that jury with the type and quality of evidence that would convince them beyond any reasonable doubt whatsoever that all those questions, whether they be two or three, as it turns out, should be answered yes. You know the result is that the Defendant would automatically be sentenced to death under the laws of this state. That's our position. Of course, they have their position and they're entitled to that. Ultimately it's up to the jury to decide, but we want you to know going in what our position would be based on the evidence that we intend to present. Okay?

A Yes.

Q Now, just to get those preliminary matters out of the way, let me just ask you -and it really boils down, I guess to a large degree in any case, to some of the questions you've already answered here on the second and third from the last page of the questionnaire. Let me ask you: Even though you had little time to do that yesterday, really, and certainly little time to think about it. You've had overnight, but let me just ask you **[61]** if you, at this point, would share with all of us your personal feelings on the death penalty and then, secondly, your ability or inability to serve on this type of case, if you're called upon, as a juror?

A Well, I believe in the death penalty if a person is found guilty in a capital murder case. For me to arrive at that decision would not be easy. It would be a very heart-felt decision and something that I would not come to easily. But if I believed the Defendant was guilty of the crime, if the evidence was presented and I found him guilty, then—the degree and seriousness of the crime, then I could give the death penalty, but it would not be an easy decision, but it's one I could make.

Q Let me ask you this: I gather from what you're saying that you feel the death penalty is proper under certain circumstances?

A Yes. I don't believe, like I said, in an eye for an eye, but you also have to look at the crime itself.

Q I gather from what you're saying that you think it should be reserved for very

* * * *

[86] DENNIS W. MERRELL,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Good morning, Mr. Merrell.

A Good morning.

Q Let me begin, by reintroducing everyone here at the counsel table. My name is Paul Macaluso. To my immediate left is Jim Nelson.

MR. NELSON: Good morning.

Q Mr. Merrell, you may recall yesterday when we were all introduced to you, there was another gentleman seated over here and his name is Norman Kinne. He will actually be presenting the evidence on behalf of the State of Texas, if you're a juror on the case, but Mr. Kinne, Jim and I—actually it's Norman. I call him Mr. Kinne. We're assistant district attorneys in Dallas. We're assistants to Henry Wade and we've been designated as the lawyers to represent the State of Texas in this

* * * *

[90] case, okay?

A Okay.

Q So, relax, if you have a question, ask it. If there is a statement that you wish to make at any time, make it, okay, whether I'm talking to you or when I'm through and the other lawyers are talking to you.

Now, let me just tell you what our position is at the outset here, that is the State of Texas. The Judge foreshadowed some of this yesterday, but I want to make our position completely clear, all right?

A Okay.

Q We, that is the State of Texas, are actively seeking the death penalty in this case for this Defendant. We make no bones about it. We want you to know what our position is based on the evidence at the very outset. In other words, we intend to be able to provide you, if you're a juror on this case, as well as eleven others, with both the type of and the quality of evidence that would convince you beyond any reasonable doubt that that man is guilty exactly as he's been indicted and charged in this indictment. **[91]** That's done in the first part of the trial. In the second part of the trial, once again, we intend to provide a jury with the type and the quality of evidence that would convince them beyond any reasonable doubt whatsoever that all of the questions that will be submitted to the jury in the second part should be answered yes, which you know automatically results in a sentence of death.

MR. WEST: Your Honor, I'm going to object to the improper voir dire pursuant to Article 37.07, subsection G, wherein the code is very specific and I think it should be taken up outside the presence of this juror.

THE COURT: Okay. Mr. Merrell, let me ask you to go out in the hall for just a moment, sir, while we resolve this law question.

(Whereupon, Mr. Merrell left the courtroom, after which the following proceedings were held.)

* * * *

[94] MR. MACALUSO: I don't believe I did. I never have, Judge.

THE COURT: They may be told what the effect of an agreement is either way or, I should say, a failure—if they

vote no, then a life sentence would result. I understand your objection, but I'll overrule it at this point.

MR. WEST: Note my exception.

THE COURT: Bring Mr. Merrell back, Bob.

(Whereupon, Mr. Merrell returned to the courtroom and the following proceedings were held.)

THE COURT: Go ahead, Mr. Macaluso.

Q I've almost forgotten where we left off. I believe I was just telling you basically, Mr. Merrell, what our position is in this particular case. I said our position, of course, would have to be based on the evidence. **[95]** I just wanted to tell you what our position is at the very start of the trial, that we are actively seeking the death penalty in this particular case. Ultimately, of course, it's entirely up to the jury to make that decision.

Now, first, we have this questionnaire that you've completed and that, as the Judge said, saves us a great deal of time. Before we go any further than just my preliminary remarks, let me just ask you—I know you've already answered this in the brief time that you had and in the brief space that you had, but would you share with us at this point, number one, your personal feelings with regard to the death penalty or capital punishment and then, secondly, your ability or inability to actually serve or participate in making a decision on this type of a jury?

A Okay. My personal belief on the death penalty is that it does serve a place in this society. I think it is taken care of by the majority of the people that have made this a law and I go along with that being part of this society. What was the second part of your question, again?

* * * *

[104] DONALD J. HAMBRICK,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Good afternoon, Mr. Hambrick. Let me begin by reintroducing everyone here at the counsel table. My name is Paul Macaluso and to my immediate left is Jim Nelson.

MR. NELSON: Hi.

Q You may recall that we were introduced to you, along with Norman Kinne, who was seated right here. He will actually be presenting the evidence on behalf of the State once the trial begins. Norman Kinne, Jim Nelson and I are all assistant criminal district attorneys here in Dallas and we've been designated as the lawyers to represent the State of Texas in this particular case. Now, to Jim's immediate left is Brice Cunningham.

MR. CUNNINGHAM: How are you, Mr. Hambrick.

MR. HAMBRICK: All right.

* * * *

[107] feelings about the death penalty, capital punishment, all sorts of things, to answer up in front of a bunch of strangers, it might be a little bit inhibiting.

A Yes.

Q So the law allows us to talk to you in this relative degree of privacy. We want you to, as the Judge said, relax as much as you possibly can. Of course, bear in mind that there are absolutely no right or wrong answers to any of the questions you're going to be asked here. Just tell us how you feel. We're going to rely, to a large degree, on you, also, to just tell us, if there's something about your background or your feelings about this type of case that we need to know about, in fairness to both sides, okay?

A Okay.

Q If you have a question, by all means ask it at any time. I know I speak for the other lawyers when they talk to you, as well. If there is something that you would like to tell us about it, just tell us, okay?

A Okay.

Q Now, let me tell you right off **[108]** what our position is with regard to this case. Mr. Hambrick, I want you to know from the very outset here, so it comes as no surprise to you if you're selected as a juror, that the State of Texas is actively seeking the death penalty in this particular case for this Defendant. We're not trying to hide the ball or trying to surprise you later on, if you're on the jury. That's our position. In other words, we intend to be able to provide to you and eleven others, if you're on the jury, both the type as well as the quality of evidence that will convince you beyond any reasonable doubt whatsoever that that man is guilty exactly as he is charged in this indictment.

Then in the second part of the trial because the trial is divided into two parts, once again provide you and the other jurors with the type and the quality evidence that will convince you beyond any reasonable doubt that those questions should be answered yes. You know, if they are all answered yes, whether there be two or three questions, then the law requires the Judge to assess a sentence of death. It's automatic and **[109]** the Judge has no leeway in it. Do you understand that?

A Yes.

Q Okay. Now, that's our position and I'm sure they have a different position. I'm confident of that. Ultimately, of course, it doesn't matter what our position or their position is. It matters what the jury decides on the basis of the evidence. Am I making myself clear?

A So far.

Q Now, with those preliminary remarks—by the way, let me also say one more thing. No one is going to try and talk into or out of a position. No one is going to argue with you or quarrel with you about any honest or conscientious feeling that you have about anything.

A Okay.

Q So don't be afraid to speak your mind on any subject, all right?

A All right.

Q Now, we know you've been asked this question on the questionnaire and you have answered it, but we know you were given **[110]** precious little time, really, on a pretty weighty subject. Let me ask you if you would share with us at this time, sir, once again in your own words, how you feel generally about the death penalty and capital punishment and then your ability to serve and actually participate in this type of a case as a juror?

A Okay. Like I said on my questionnaire, you know, I believe, if somebody takes a person's life, based on—if I'm a juror, based on the facts—you know, if it comes to the point that the death penalty is the proper punishment, then that's what he or she will get.

Q I gather from what you're saying that you do believe the death penalty has a purpose or serves a purpose in our society. How do you view it in that regard; do you think it serves a particular purpose or fulfills a particular need?

A It fills a particular purpose.

Q How do you view that? In what particular manner? Like some people say, well, it acts as a deterrent, you know, maybe gets people who might be thinking about committing a

* * * *

[130] who you are and where you live." That might not be an excuse to murder, but you can see, if I hadn't said that, maybe Mr. Nelson wouldn't have shot me. Do you see?

A Yes.

Q Okay. Even though it's provoked doesn't mean you automatically answer the question no. You decide whether or not there was provocation and was it reasonable or unreasonable because of the person's death. Do you see? You might say, I don't care if he said he could identify him. That's unreasonable for him to kill him, in which case you answer the question yes. Do you see what I'm getting at?

A Yes.

Q It's a little bit confusing, but if it's unprovoked, you answer the question yes and again, as I said earlier, you may not even receive that with those questions. Do you have any questions at all about the three questions?

A No.

Q Okay. Let's shift our thinking for just a second here and shift away from what we've been talking about, capital murder, and **[131]** go back to murder. There's a situation that could arise and I'm not suggesting that it would arise in this case or any particular case, but it's a possibility that we need to discuss with you at this point. Imagine for a moment that you're on this hypothetical capital murder jury. Let's say instead of murder during a robbery, as we've alleged in this particular case, let's say the case involves a murder during a burglary which, as you know, is another type of capital murder. Let's say in the first part of the trial you were satisfied, along with the other jurors, beyond any doubt at all that A, the Defendant, killed B and it was murder, but let's say you had some reasonable doubt where you just didn't believe that the offense was in the course of committing a burglary. Well, you understand that we have to prove both a murder and burglary if we expect you to find the Defendant guilty of what we've charged him with which is capital murder? Do you see what I'm getting at?

A Yes.

Q We haven't done that in that **[132]** situation, have we?

A Not yet.

Q Okay. If that were the situation, you would have to find the Defendant not guilty of capital murder because we didn't prove that. We didn't prove the burglary aspect. Instead, you find him guilty of what we did prove, which would be murder.

A Right.

Q Let's assume we did that. No longer, you understand, is it just automatically death or automatically life. Do

you see? Instead, the range of penalty is as broad as it is for any offense under the laws of this state. Really, it's up to you as a juror in a situation like that basically to tailor the punishment to fit the facts, the Defendant and the crime as you decide it to be and that's all we're asking you to do. In other words, you listen to all the evidence and don't prejudge anything. If you feel, for example, that after hearing all of the evidence—and obviously you haven't heard stick of evidence thus far, have you?

A No.

[133] Q You wait over there and you listen to all of the evidence in your murder case now and, if you feel that the facts call for it and warrant it and justify it, you would have to give the minimum if you felt that was proper to your way of thinking. If, on the other hand, you heard a fact situation and you learned about the Defendant in an offense that you feel calls for and warrants and justifies and where you feel the right thing to do would be to give the maximum, you would do that? Any problem with that at all?

A No.

Q Okay. The range of penalty for murder, regular murder, not capital murder, is as low as five years all the way up to ninety-nine years or life in the Texas Department of Corrections and an optional $10,000.00 fine. Do you know of any reason, sir, why you couldn't assess a penalty somewhere within that range?

A No.

MR. CUNNINGHAM: If the facts and circumstances called for it, Your Honor.

[134] MR. MACALUSO: Yes.

Q That's what I'm saying, of course, where the facts and circumstances called for it and warranted it and you—

A If they called for it, I think I could.

Q Okay. Now, I don't know if the Judge covered this. I don't think he did, but a conviction, whether it be for capital murder, murder, or any other offense that I know of

other than treason, I think, can be had on the testimony of one eyewitness to the crime if a jury believes beyond a reasonable doubt the testimony of that eyewitness. In other words, you can in certain types of crimes that there may only be one remaining witness, a rape case, for example. A lady that's been raped and she identifies somebody, the law says if you believe that individual, whether it be a rape case or a murder case, beyond a reasonable doubt, the person who identifies somebody, you can base a verdict on that. There is any reason why you couldn't do that, Mr. Hambrick?

A Well, I'm not going to base my—you know, my basic conviction on just one

* * * *

[152] EMILY C. WILLIAMS,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Hi, Ms. Williams. My name again is Jim Nelson as I was introduced to you want to take just a couple of minutes to reintroduce everybody who is sitting here. Beside me is Mr. Paul Macaluso. If you will remember yesterday, we were introduced to you as a group and sitting right about there was a gentleman by the name of Norman Kinne. Mr. Kinne, Mr. Macaluso and myself are all assistant district attorneys here in Dallas. We were assigned by Mr. Wade to handle this particular case and that's what we're going to do. Mr. Macaluso and I will pick the jury and Mr. Kinne is going to be responsible for putting on most of the evidence.

To my left is Mr. Brice Cunningham.

MR. CUNNINGHAM: How are

* * * *

[155] you think we can do that?

A Yes.

Q Okay. Are you starting to relax a little bit?

A Yeah.

Q Okay. Good. Now, as I've mentioned and you've heard three or four times already, this is a capital murder case and I want you to know right now up front as we, go into this that the State of Texas is going to actively seek the death penalty for this man sitting at the far end of the counsel table in this case. We feel like and we plan to present evidence to you that will convince you beyond a reasonable doubt that he's guilty of the offense of capital murder and that the three questions on those boards right there should be answered in the affirmative with a yes answer. Three yes answers there result in the death penalty under the law of the State of Texas. I feel like you have a right to know going in what we're planning on doing and what our opinion is in this case.

Ms. Williams, I noticed on your information sheet that you filled out here **[156]** yesterday that you answered a little bit on the death penalty your feelings, but I know you didn't have much time to think about it and you were kind of under a pressure situation at that time. I hope you've had a chance to think about it a little bit more overnight. I'm just going to ask you right now what your feelings are about the death penalty. Are you in favor of it or against it? How do you feel about it?

A I'm in favor of it.

Q Okay. You understand, I think, Ms. Williams, from the things that the lawyers have said that there are certain situations where the death penalty is deemed proper under Texas law. Number one, just a plain murder, knowingly or intentionally causing the death of another individual is not a death penalty offense in this state. It has to be coupled with certain situations. For example, it has to be the killing of a police officer or a fireman in the lawful discharge of his duty or the killing of more than one individual, which is a new law

that was just passed this last year. It can also be certain situations where, if it's a killing in conjunction with a robbery -

* * * *

[176] just on emotion say, well, this man deserves to die for what he did. You have-to answer each of those three questions based on the facts that are brought to you. Do you feel like you can do that?

A Yes.

Q Do you feel like, if we didn't prove to you that one of those was true, you could answer it no?

A Right.

Q I think what you told us before, you're going to have to hear the evidence before you could make that decision; is that right?

A Yes.

Q I think that's all either side is going to ask you to do, Ms. Williams, is listen to the evidence and make a decision as to these facts based on that evidence, okay?

A Okay.

Q Now, there may be a situation—we don't anticipate it in this case, but there may be a situation where capital murder is not proved, but murder is proved. Do you remember I talked about if we don't prove committing **[177]** or attempting to commit robbery, then it's just a simple offense of murder?

A Yes.

Q The range of punishment in that case would be anywhere from five years up to ninety-nine years or life and you could assess an optional fine of up to $10,000.00. Now, in order for you to be qualified to serve as juror, you have to tell us that you could consider that entire range of punishment if the person were found guilty of murder rather than capital murder. You understand that there can be several levels or different types of murders, several different ways

that a death of a person can result. Do you feel like you can consider anywhere from five years up to ninety-nine years or life for the offense of murder?

A Yes.

Q Okay. You don't have any problem with that then? If you feel like five years is called for and justified by the circumstances, you could assess that and, if you feel like life or ninety-nine years is called for and justified by the circumstances, you could assess that?

[178] A Yes.

Q Okay. Now, you understand also, Ms. Williams, that we don't have to prove to you motive or premeditation in any murder case. That's not an element in a case. You know, you watch on TV and they talk about motive or was it premeditated, so that makes it first degree murder and so on and so forth, but we don't have to prove that in Texas. We don't have to prove what the motive was for the killing and we don't have to prove any type of premeditation. Do you have any problem with that?

A No.

Q Okay. We've talked a lot about evidence and about how you're going to have to base your verdict on the evidence and obviously that's what we want you to do. You can't make a decision sitting there right now because you haven't heard anything yet. That evidence is going to come from witnesses on the witness stand and you're going to have to judge the credibility of those witnesses. What we ask you to do there is give each witness an equal starting point. I envision it kind of like

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[196] DAROL L. WEIGANT,

called as a jury panel member having been sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Mr. Weigant, let me begin by reintroducing everyone here. I'm Paul Macaluso. I'm an assistant criminal district attorney along with Jim Nelson to my immediate left. You may recall that Norman Kinne was seated over here yesterday we were all introduced to you. I don't believe we've ever met. I know you work for the sheriff's office, but I don't believe we've ever met. We may have seen each other in passing in the halls.

A I've never see [sic] you.

Q All right. You know that we work for the district attorney's office and we represent the State of Texas in this particular case. We're the lawyers for the State, as you well know. To Jim's immediate left is E. Brice Cunningham.

MR. CUNNINGHAM: How are

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[203] charged with capital murder, as I'm sure you know, can receive only one of two possible penalties, life or death. It depends on the answers to the questions and the way the jury decides to answer them.

We are actively seeking the death penalty in this case, Mr. Weigant. That is, we intend to be able to provide a jury with the type and quality of evidence that is going to convince them beyond a reasonable doubt that the Defendant is guilty in the first part of the trial and in the second part, provide them with the type and quality of evidence that will convince them beyond a reasonable doubt that the questions all should be answered in the affirmative, yes, yes, yes in each case, which as you know results in the Judge assessing a sentence of death. Now, the jury may disagree with this. That's why we have a jury up here. That's our position and I think it is only fair to you, certainly, and to anyone else who is a prospective juror in this type of a case to more or less acquaint them with or put them on notice of what our position is relative to the evidence bearing in mind naturally that it is **[204]** up to you and the eleven others that will be on this

jury to make that ultimate decision. There will be two decision, [sic] actually.

Now, you've indicated here on question fifty-six—and there are only three lines provided there for you to express your feeling about the death penalty and then two or three other questions about whether or not you could sit on this type of a jury and you answered those. Could you share with us your personal feelings about the death penalty and your ability to actually serve on this type of a case and actually make those decisions that might result in the execution of this man right down there? How do you feel about the death penalty? I know you said you believe in an eye for an eye and you believe it's a deterrent.

A I believe that they should have the death penalty for any premeditated murder.

Q All right. You understand that's not the law?

A I know that.

Q Let me just hit on that while we're on it. There are some aspects of the law that I don't agree with and I'm sure there are

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[228] that would be true, also. You could be on a case and hear a fact situation- where you personally don't think that individual ought to receive—you know, if you could vote directly, you would say, "I don't think that person ought to get the death penalty.", but when you come to analyzing the evidence, let's say it does fit, the evidence actually fits those questions like a glove, each one of them was proven to you beyond a reasonable doubt to be yes. Do you see that would be contrary—

A I would have to answer yes.

Q Even though you personally desire a life sentence, if you could do it that way?

A If they were all yes. It would have to be yes or I couldn't.

Q Well, you would be guided by the evidence as to whether it called for a yes or a no answer?

A Yes, sir.

Q Let me shift gears here for one second. I know the Judge is looking at me and I don't blame him because I'm going over my time limit. Let's shift our thinking for one second to two matters. One is a situation here **[229]** where, if you're on this imaginary jury, let's say you have heard all the evidence in a capital murder case and let's say it's murder during a burglary, all right? Let's say you're satisfied that A killed B and there's no doubt about it, but let's say you didn't hear any evidence about the burglary at all or you had a reasonable doubt about that, all right? You understand for you to convict someone of capital murder, we have to prove both aspects of capital murder, both the murder and the burglary?

A Yes, sir.

Q All right. We didn't prove the burglary, did we?

A No, sir.

Q All right. So you can't convict him of capital murder. Instead, you convict him of what we did prove, which was what?

A Murder.

Q If you did that, then you forget about mandatory life sentences or death. It's a first degree felony murder and all the law expects you to do in a situation like that, in a murder case, is to be open-minded and do **[230]** what you've told us you would do already and that's simply say, "I will listen to all of the evidence in a murder case and, if it's a proper case, after I've heard the evidence, that I feel calls for a particular type of punishment to my way of thinking after I've heard all the evidence, then that's what I will give. If it is what I think calls for the minimum, I'll give the minimum. After I've heard all the evidence, if I think it is proper and just and the right thing to do to give the maximum, I'll give the maximum, whatever it may be. Can you do that?

A Yes.

Q Now, you know that the range of penalty for murder is as little as five years up to ninety-years or life. You don't have to imagine a case that would call for five years or one that would call for ninety-nine years or life, but are you able to tell us that, if you see a fact situation in a murder case that, to your way of thinking, calls for the minimum, you could give, five years in the Texas Department of Corrections for murder? If you see one that calls for ninety-nine years or **[231]** life, you could do that as well and even add on a $10,000.00 fine? Can you do-that?

A Yes, sir.

Q In other words, you will wait until you hear all the evidence?

A Yes, sir.

Q One other thing and then I'll let the other lawyers talk to you. Obviously, we discussed earlier that you are a sheriff's deputy. I anticipate that there will be other law enforcement officers testifying. You do not apparently know or think you know any of these? You understand that the law expects any juror to judge any witness by the same yardstick regardless of that witness' station in life, occupation, the color of their clothing, color of their skin or anything else?

A Yes, sir.

Q Can you do that?

A Yes, sir.

Q In other words, you know as well as I do. You've worked with law enforcement officers and you know they're capable of telling the truth and, I guess, some of them are capable of lying because they're just human

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[332] MARY I. SUMROW,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Good morning, Ms. Sumrow. As I was introduced to you on Monday, my name is Jim Nelson. I'm an assistant district attorney in Dallas and I want to reintroduce everybody here. Right next to me is Mr. Paul Macaluso. I think you will remember Monday that another gentleman was sitting with us at about that corner of the counsel table by the name of Norman Kinne. The three of us are assistant criminal district attorneys in Dallas and we've been assigned by Mr. Henry Wade, our elected district attorney, to handle this case for him in this court and that's what we're going to be doing. Seated to my left, immediately to my left, is Mr. E. Brice Cunningham.

MR. CUNNINGHAM: Good morning.

Q Next to him is Mr. Royce West.

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[354] irate about what had happened or whatever that would take—if you felt that the person should get death, yet we failed to prove that the answer to question number one was yes, could you answer that question no?

A Yes, I could.

Q Even knowing that would result in a life sentence rather than a death sentence that you wanted emotionally, you feel you could intellectually set that aside and answer that question no because that was what the evidence showed?

A Yes, I could.

Q Okay. There's no question about that in your mind?

A No, none at all.

Q That's we're asking you to do, Ms. Sumrow, is base your verdict on the evidence and not your emotions.

A Right.

Q Now, there is always a chance in a case like this, although we don't expect it to happen, that all will be proved will be the offense of murder. Let me give you a hypothetical example. Let's say we've got a **[355]** murder committed in the course of a burglary case. Let's say we prove to you that the Defendant in that case knowingly or intentionally caused the death of another individual, but we don't prove anything about a burglary, nothing about a burglary at all, then it's your duty, is it not, to find the Defendant guilty of the offense of murder?

A Yes, it is.

Q Okay. Knowing or intentionally causing the death of another individual. As I said, the death penalty is not an option in that case. The punishment range is anywhere from five years up to ninety-nine years or life and an optional fine of up to $10,000.00. Now, would you agree with me that there are—and I can't go into examples, but there are several or a multitude of circumstances under which one person could knowingly or intentionally cause the death of another individual. A multitude is about the best word I can think of of situations in which that could happen. Again, we aren't talking about self-defense and we aren't talking about accident or something like that, but still a multitude of circumstances. **[356]** That's why murder has the widest range of punishment than any Texas law allows, anywhere from five years up to ninety-nine years or life.

Now, in order for you to be able to be qualified to serve as a juror, you have to tell us that you would be able to consider that entire range of punishment for murder. You don't have to tell us right now what you would assess because obviously you haven't heard the facts. You don't know what the facts are. What you have to be able to tell us is, that if, after you've heard all of the evidence you're going to hear, you feel that the facts and circumstances justify and call for a sentence of ninety-nine years, you would give it. At the other end, you have to be able to tell us that, if you feel that the facts and circumstances, as you find them to be, justify a sentence of five years, you can give that or twenty years or

forty-five years, anything in between. As you're sitting there right now, Ms. Sumrow, you don't even have to be able to verbalize to us the facts and circumstances that would justify five years or that would **[357]** justify life or something in between. You do have to be able to tell us that, if the facts and circumstances justified that in your mind, whatever that may take, you would assess a five year sentence if you felt it was justified or a ninety-nine or life sentence if you felt that was justified. Now, can you do that for the offense of murder?

A Yes, I could.

Q As I've said over and over again, what we're going to ask you to do is base your verdict on the evidence as you hear it and keep an open mind until you've heard all of the evidence, everything you're going to hear, before you make the decision because we want you to base your decision, base your verdict, on that evidence. I believe you're telling us you can do that; is that right?

A Yes.

Q Okay. If that evidence justifies five years or calls for five years, you will give five years; is that right?

A That is correct.

Q If the evidence calls for sixty years, you will give sixty. If it calls for **[358]** twelve years, you will give twelve. Whatever it is in that range, you can consider the entire range based on the law and the evidence; is that right?

A I believe that's correct.

Q Okay. Now, the law allows the Defendant to either testify or not to testify. It's his option. If he wants to testify, no one can stop him. If he doesn't want to testify, no one can make him testify. If he does not testify, you can't consider that. You can't talk about it in your deliberations and it can't come across your mind at all that he didn't testify or why he didn't testify because he has an absolute right under the Fifty Amendment of the constitution to not testify. Do you have any problem with that?

A No, I don't.

Q If he does testify, you could judge him as you would any other witness; is that right?

A That's correct.

Q All the witnesses, basically, Ms. Sumrow, start out at the same point. It's kind of like race. Everybody starts out at the

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[392] A I do not see how it would, no.

Q Are you sure about that?

A I feel sure about it.

Q No vacation plans?

A No, sir, not until the summer.

MR. WEST: Nothing further, Your Honor.

THE COURT: Thank you, Mr. West, Mr. Nelson, Mr. Macaluso.

MR. NELSON: Your Honor, we would be very pleased to have Ms. Sumrow serve as a juror on this case.

MR. WEST: Your Honor, I guess I'll have to concur with Mr. Nelson and we would be very pleased to have Ms. Sumrow on this case, also.

THE COURT: Ms. Sumrow, Let me ask you—I'm going to give you an oath as a juror in this case. You have been accepted by both sides.

(Whereupon, the juror was duly sworn by the Court.)

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[478] MARGARET M. GIBSON,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Good afternoon, Ms. Gibson. Let me begin by reintroducing everyone here. My name is Paul Macaluso and to my immediate left is Mr. Jim Nelson.

MR. NELSON: Good afternoon.

Q You may recall being introduced as well to Norman Kinne. He was seated over here. We are all assistant criminal district attorneys in Dallas and we're assistants to Henry Wade who, I'm sure you know, is the district attorney for the next ten months or so. We've been designated to represent the State of Texas in this particular case. To Jim's immediate left is Mr. E. Brice Cunningham.

MR. CUNNINGHAM: How are you doing, Ms. Gibson?

MR. GIBSON: Very well,

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[482] punishment. Do you see what I'm getting at?

A Uh-huh.

Q As I said earlier, all we want to know is exactly you feel or any juror feels with respect to the potential service on a case of this magnitude.

Now, let me tell you right off what our position is and that is the position of the State of Texas with regard to this particular case. Ma'am, we are actively seeking the death penalty in this case. The State of Texas here in Dallas County is actively seeking the death penalty for Thomas Joe Miller- El. That is, we intend to be able to provide the jury, once it is selected, with the type and the quality of evidence that will convince them beyond any reasonable doubt, in the first phase of the trial, that the Defendant in this case is guilty exactly as he has been charged with capital murder.

Then in the second part of the trial, we intend to be able to provide a jury with both the type and the quality of evidence that would convince the jury beyond any reasonable doubt that those questions that will [483] be submitted to the jury in that phase of the trial should be answered yes. I'm sure you may recall from the remarks of the Judge, all

yes answers, two or three, whatever the number of questions you get, all yes answers will require Judge McDowell by law mandatorially to sentence the Defendant in this case to be executed by lethal injection down in Huntsville, Texas. The reason I'm telling you that is not to—well, just to be fair with you basically, to tell you what our position is.

Ultimately, of course, our position really isn't what controls, you understand that, it's the findings of the jurors who ultimately will comprise this jury. I think it is only fair to let you know what our position is up front, that we are actively seeking, at the end of this trial basically, that this man be taken down to Huntsville, Texas and put to death. Like I said, it would be unfair of us not to let you know that, what our position is.

Now, you have been asked here about your position and your feelings about the death penalty. As I said, no one will quarrel **[484]** with you. No one is going to make anybody serve on a jury, for example, if they have a strong type of either religious, moral or personal convictions that would prevent them from participating in this type of a case. Let me just tell you that right off. That's why we get to ask you these questions now, to clarify certain things, so that you ultimately can tell us—I'm saying tell us, you're really telling all of us. Even though you're looking at me now and I'm asking the questions, they're listening to everything you have to say as is Judge McDowell, as is the court reporter who is taking down everything for appeal purposes.

No one is going to try and put you in a position that is untenable, be it strong, religious or whatever feelings there may be that could prevent you from actually serving on this type of a jury. Now, let me just ask you before we go any further. I know you've been asked this question on three lines here. Fifty-six was, do you believe in the death penalty. Let me just ask you, if you could in your own words, to share with us your personal feelings about the death penalty and capital **[485]** punishment and then, secondly, probably just as important, your ability or inability to actually on a jury of

this type and render a decision or actually participate potentially in the execution of the Defendant?

A I don't believe in the death penalty. I don't know why it was started. I don't think it solves anything. It's the ultimate punishment and it's part of the law and, if the law so renders the death penalty, I can't stop it, but I personally do not believe in it.

Q Is this for any particular reason? Is this a personal feeling that you have about it or—

A It's a personal belief.

Q All right, have you felt this way for some number of years or just—is it something you've thought about, you know, more seriously, of course, when you were asked or informed that you were going to be a prospective juror on this type of case?

A Oh, I think I answered that my gut reaction was that I don't believe in it and I never really thought much further than that. I

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[492] Q Regardless of the evidence and regardless of the facts. You could vote for something else, maybe a life sentence?

A Yes.

Q Or some number of years, but never death?

A Never.

Q Okay. About thirteen years ago, the law changed. It's no longer done that way. It's not done directly, but the procedure up to that point is largely the same. You know the evidentiary phases are the same, the same type of testimony largely is admissible, basically the same types of offenses, you know, very serious types of crimes. In this case, now, it's murder. In some instances it must be murder of a particular class of individual or murder plus another offense. A murder and a robbery is alleged in this indictment. A murder during rape, kidnapping, arson, burglary. The dif-

ference comes in at the very end of the trial when you go back to decide—make certain decisions. It is no longer decided directly. Instead, as the Judge told you on Monday, you take back with you two or

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[506] put aside your personal feelings?

A Yes, I do.

Q I think you've already said you could do that. Do you understand that the convex of that is just as true? Let's say you heard a case where you said, if I could vote, as you've said, I would never, ever vote for a sentence of death. It's a capital murder, but it's not the type of capital murder that anyone should be executed for, but in all intellectual honesty, number one, they proved that to me. I'm being honest about it. It should be answered yes and number two yes and number three yes. Would you go ahead and do that and put aside your personal feelings?

A Yes, I could.

Q Now, let's shift gears here for just a second in the time that I have remaining and let's talk about a situation that I'm not suggesting would occur in any case, much less this one. It's a situation where, again, hypothetically Ms. Gibson is on a jury and it's a capital murder case. Let's say it's a capital murder and it's murder during a burglary, as an example of another type of a **[507]** capital murder. Now, let's say that you have heard all the evidence in the first part of the trial, the first phase of the trial, the guilt or innocence phase, and you and the other jurors have no doubt whatsoever that the Defendant in that case committed murder, but you didn't hear any testimony about a any burglary or you have a reasonable doubt about it. Do you understand that for us to expect you to convict someone of capital murder, we have to prove both components of the offense, a murder and a burglary? Am I making myself clear?

A Yes, sir.

Q We didn't do that though, did we?

A No.

Q So you can't convict him of capital murder. You can only convict him of what we proved to you and that's the offense of murder. Were that to happen, were you to convict someone of murder and not capital murder, but just murder under the laws of Texas, then you forget all about death, mandatory death and mandatory life. The range of penalty for murder is very broad. In fact, **[508]** it is as broad as any range for any offense under the laws of the State of Texas.

Now, let me talk to you a little bit about what murder is and what murder is not. Murder basically is a situation where one person knowingly or intentionally causes the death of another individual without any legal excuse or legal justification. You see, you can kill somebody under certain circumstances and it's not murder. In fact, I'm going to cite four examples for you right now. For example, you can kill someone in self-defense. You could be charged with murder, but you—let's say, if I was charged with murder and you were on my jury and you believed that I acted in self-defense, reasonable self-defense, you would have to find me not guilty. Do you understand that?

A Yes.

Q Because I would have to find you not guilty if it was I on your jury. You can kill somebody—you have a right to self-defense and so do I. We're not thinking about murder when we talk about the range of penalty. We're not talking about self-defense when we **[509]** talk about that sort of thing. That's not guilty. It's no offense.

The same thing would hold true if you believed that someone charged with murder acted accidentally. It was an accident. The gun fell or the gun went off accidentally or however it was. That's not murder, either. That's not guilty if you believe that—or if you felt someone was insane. As much as people get up in arms about the insanity plea these days, if you honestly believe or have a reasonable doubt that the person charged with murder acted because he was insane, you have to find him not guilty. It's not murder. If it's a situation where someone killed somebody in the act of sud-

den passion, in other words, the heat of sudden passion, that's not murder, either. In other words, if a father were to come home, God forbid, and find out that his little daughter had been sexually abused by a neighbor and the neighbor was up the street laughing about it and he goes into a rage. He flies off the handle, picks up a gun, runs down the street and kills the neighbor. The law doesn't excuse that. Some people think it is **[510]** temporary insanity. The law doesn't excuse that behavior, but it doesn't call it murder. If you believe those facts and you're on a jury, you wouldn't convict that individual of murder because it is not murder. It's voluntary manslaughter basically. Do you see what I'm getting at?

A Yes.

Q What I'm saying is, I want to draw a clear distinction between what murder is and what murder is not when we talk about the range of penalty, that broad range of penalty. Again, I don't want to dip back into the cliche bag, but the law expects a juror to be able to tailor the penalty in a murder to fit the facts as they decide them to be.

Let me ask you: Erasing the self-defense, erasing the accident, erasing insanity and erasing the crime of passion, let me ask you, what do you personally feel the minimum penalty ought to be for someone who knowingly and/or intentionally causes the death of another individual, commits murder? What do you feel the minimum penalty ought to be under any facts and circumstances?

[511] A I don't know. I've never thought about it before.

Q All right. Let me ask you this: The range of penalty under the laws of the State of Texas is as low as five years, as high as ninety-nine years or life and an optional $10,000.00 fine and the law expects a juror, if they can in all honesty, to be able to set the penalty to fit the facts after they've heard all the evidence, if they can. Erasing those other qualifications, they don't mitigate a murder by saying, "I think he might have been insane and I'll give him five years." If you

think someone is insane, you forget about it and you find him not guilty. Am I making myself clear?

A Yes, sir.

Q I just want to make sure you're not considering those things. Let me ask you: Do you believe you could ever set a penalty as low as five years if you felt the facts and circumstances warranted it? In other words, do you feel, whatever the set of facts and circumstances to your way of thinking would ever justify a sentence as low as five years in **[512]** the Texas Department of Corrections for a knowing and intentional murder?

A Yes.

Q Okay. I gather, if you heard facts and circumstances that called for a sentence as high as ninety-nine years or life, could you do that?

A Yes, I could.

Q And even an option of a $10,000.00 fine?

A Uh-huh.

Q One other matter. Let me ask you this: Could you—the law allows the State to prove either a capital murder or a shoplifting case or a rape case or whatever the case may be using the testimony of one eyewitness to the case. If you believed the eyewitness and you believed the eyewitness is capable of testifying as to all the allegations contained in the indictment—okay?

A Uh-huh.

Q Like I say, whether it be a capital murder or whether it be shoplifting a package of chewing gun, how do you feel about that? Do you believe that in a case of this

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[523] please.

(Whereupon, Ms. Gibson left the courtroom, after which the following proceedings were held.)

THE COURT: Mr. Macaluso, I hold the juror is qualified. You-all may want to discuss what you want to do.

MR. MACALUSO: Judge, we would be pleased to exercise a preemptory challenge.

THE COURT: Bring her back in, Ted.

(Whereupon, Ms. Gibson returned-to the courtroom and the following proceedings were held.)

THE COURT: Ms. Gibson, you've been excused from service in this case, which means you can leave here and go back to your job, your home or whatever. I'm not going to let that happen though without thanking you for

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[527] CAROL A. TAYLOR,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Good afternoon, Ms. Taylor. As I was introduced to you on Monday, my name is Jim Nelson and sitting next to me is Paul Macaluso. I think you'll remember that on Monday there was a gentleman sitting right at the corner of that table. His name is Norman Kinne. The three of us are assistant criminal district attorneys here in Dallas. We've been assigned to present the evidence for the State of Texas in this case. Seated to my left is Mr. Brice Cunningham.

MR. CUNNINGHAM: How are you, Ms. Taylor?

MS. TAYLOR: Fine.

Q To his left is Royce West.

MR. WEST: Good afternoon, Ms. Taylor.

Q These two gentlemen have been

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[529] myself clear on anything.

You're a prospective juror in this case. We have one juror at this time. We need eleven more. What we're going to try to do in the next few minutes is get to know as much about you as we can in a little bit of time. In order to do that, we're going to as some questions that—I'm going to ask you for some personal feelings about things and that's part of the reason, I think, you're in here by yourself rather than with the entire group as you were on Monday. I didn't notice, but have you been on jury service before, ma'am?

A No.

Q If you have been, you would have probably spent most of your time in a group out here with forty or fifty other people and we would have talked to you in that situation rather than individually. Since this kind of case has so many weighty issues in it and it calls for some very strong personal opinions, we feel like maybe you could be a little bit more open this way and we hope that you will be.

I want you to know right up front [530] what the position of the State of Texas is in this case. We are now and are going to continue to actively seek the death penalty for the man at the far end of the counsel table, Thomas Joe Miller-El. We feel like you have a right to know that so you'll know what you're dealing with going in. We plan to present to you sufficient evidence for you to find beyond a reasonable doubt that he's guilty of the offense of capital murder and we plan to give you the type and qualify [sic] of evidence to convince you that you can answer each of those three questions yes, along with the other eleven jurors that serve on this case. The result, if you and your fellow jurors answer each of those questions yes, is going to be an automatic death penalty for this Defendant. So that's where we are.

Now, I notice in looking at your questionnaire—I know you did this in the hallway or at lunch or something and didn't have a whole lot of time to look at it or think about it, but there was a question on there about the death penalty. I'm going to ask you again, if you would, to just tell us how you [531] feel about the death penalty.

A. Well, let's see. I've never, you know, had to make a stand on this before, so when I was asked, I thought, yeah, I think I do believe that, if someone has committed a crime that's bad enough that the Court's think that he should be put to death, well, yes, I think that he should be because he doesn't need to be out in society any longer. I think the Bible says an eye for an eye.

Q You feel like it serves a purpose then; is that right?

A Yes, I do.

Q Okay. Would that purpose be—you've mentioned taking him out of society. Is there also a deterrent effect?

A You mean like life in prison or something like that?

Q Well, no. What I'm asking is, do you feel the possibility of the death penalty or the fact that it is there might be a deterrent to persons who are considering committing certain types of crimes?

A They should think about it, but I don't think it's used quite enough that it

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[548] Now, something we don't expect to happen, but that might happen is, a person would just be proved guilty of murder. Do you remember that I told you that we had to prove both the murder and it was in the course of committing robbery?

A Right.

Q Well, let me use a hypothetical. Let's say we have a person who is charged with capital murder during a burglary and we prove to you that he either knowingly or intentionally caused the death of another human being, but we didn't bring you any evidence about a burglary at all, just nothing about a burglary. Now, we haven't proved capital murder in that case, have we?

A It depends on what you're defining as capital murder.

Q Remember that I told you, for it to be capital murder, it has to be murder in the course of another offense.

A Right.

Q We aren't talking about killing a police officer or killing a fireman, but if all we prove that he caused the death of another individual, then that's just murder?

[549] A Right.

Q Okay. Murder in the State of Texas carries a punishment range of anywhere from five years up to ninety-nine years or life and an optional fine of up to $10,000.00. There's no death sentence in just a regular murder. In order for you to be qualified to serve as a juror on this case, you have to be able to consider that entire range of punishment for the offense of murder. Now, I can't give you any examples, but I think you would probably agree with me that there are a multitude of situations in which one person could cause the death of another person knowingly or intentionally. Even though it's not self-defense and it's not an accident and it's not justified in any way, there's still a multitude of background and surrounding circumstances that could come into play in something like that. Would you agree with me about that?

A Yes, I do.

Q Okay. What we need to know from you, Ms. Taylor, is whether—if you feel, after hearing all the evidence, that the facts **[550]** and circumstances justify a sentence of ninety-years or life for murder, could you give it?

A Could I give—

Q Yes, could you give it, if that's what the facts and circumstances called for?

A Yes.

Q Okay. Let's turn it around. If you felt, after hearing all the evidence, that the facts and circumstances called and justified a sentence of five years for the offense of murder, could you give that?

A Yes.

Q Okay. We aren't asking—

A I don't understand why you're asking me.

A Well, you have to us that you're able to consider the entire range of punishment. There are some people who might come in here and say, "No, there's no way I can give ninety-nine years for a murder case. I just can't do it. It's too long and I don't feel it's right." or the same thing on the five years. We have a right to know and the defense has a right to know that, since the legislature has set that entire range of punishment, you **[551]** could consider that entire range.

A Right. Sure. They know about the laws than I do and whatever they say, yes.

Q Okay. Now, basically what we're going to ask you to do on the guilt or innocence phase and on the punishment phase is to listen to the evidence and base your verdict on the evidence. Now, can you tell us that you will keep an open mind as to all the evidence in this case and not make a decision until you've heard all of the evidence?

A Sure I will.

Q And base your verdict on all that evidence after you've heard it?

A Right. Yes.

Q Okay. Now, we don't have to prove—let me back up. TV shows and that kind of thing, you hear a lot about motive for murder, premeditated murder. I understand that may be the law in California. I don't honestly know, but here in Texas, we don't have to prove to you what the motive was for a murder or for any other crime, for that matter. We don't have to prove to you that it was premeditated in any way. Do you understand that?

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[598] JOHN D. NELSON,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the .whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Dr. Nelson, good morning. Let me begin by reintroducing everyone here at the tables, or most everybody here. My name is Paul Macaluso and to my immediate left is Jim Nelson.

MR. NELSON: Good morning, Doctor.

Q Way back on Monday when we were first introduced, there was another gentleman seated here. His name is Norman Kinne. The three of us are assistant criminal district attorneys here in Dallas. We work for Henry Wade who, I'm sure as you know, is the district attorney here in Dallas. We've been designated as the lawyers to represent the State in this particular case. Now, to Jim's immediate left is Mr. Brice Cunningham.

MR. CUNNINGHAM: How are

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[603] the better citizens because they have a certain feeling about the death penalty than those who do not.

What we want to know ultimately at this time is how Dr. Nelson feels, okay? I know you've been asked this question, number fifty-six, about how you feel about the death penalty and we've given you three lines there to answer that and precious little time to think about it really. Would you share with us your feelings, Dr. Nelson, your personal feelings about the death penalty and then, secondly, your ability or inability to actually serve on a case like this and render a verdict that would result in the execution of this Defendant in this case?

Before you do that, I forgot one thing. I'm going to state one thing at the beginning. The State is actively seeking the death penalty in this case. We think it only fair to tell all the jurors initially what our position is with regard to this case. We are actively seeking the execution of Thomas Joe Miller-El for the offense for which he's been accused and indicted. That is, we intend to be **[604]** able to provide a jury, once it's

selected, with the type and the qualify of evidence, Doctor, that would convince a jury in the first phase of the trial that Mr. Miller-El is guilty exactly as he's been charged with the offense of capital murder. Then, as you know, in the second phase of the trial where the penalty is actually returned, once again we intend to be able to provide a jury, once it's selected, with the type and the qualify of evidence that would convince them beyond any reasonable doubt that those questions should be answered yes. You know that the result of three yes answers is an automatic sentence of death, a mandatory sentence of death under the law. The Judge has no power, of course, to override that. Now, that's our position, but, of course, ultimately it's the position of the jury that controls, but I think it's only fair to tell you in all honesty and as straight forward as we can what our position is and what we're seeking and ultimately that is, at the end of this trial that Mr. Miller-El be put to death under the law. Now, let me just go back to the question I asked you earlier. Would you share with us **[605]** your feelings about the death penalty and your ability to actually serve on this case, if you can?

A Yes, sir. Before I do that, I made an error on that questionnaire that's been bothering me since Monday. There was a question whether any members of my family or close friends or lawyers and I said no. I forgot about my nephew who is a city attorney in Duluth, Minnesota.

Q He's a city attorney?

A In Duluth, Minnesota.

Q Thank you for telling us that. You didn't commit even a misdemeanor by not putting that on there. Go ahead.

A I do not believe in the death penalty. I suppose this goes back to my childhood because both my parents felt rather strongly against the death penalty. I just believe – for two reasons, probably; one, morally I don't think it's right to take anyone's life. I don't care what the reasons are. Secondly, the law isn't perfect and there are always chances for errors to be made.

Q Okay. You've stated your position

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[668] HAROLD K. SOHNER,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Good morning. Is it Mr. Sohner; is that correct?

A That's correct.

Q I think I was introduced to you on Monday. My name, again, is Jim Nelson. I'm going to reintroduce the other folks here. Sitting next to me is Mr. Paul Macaluso. The other gentleman who was seated over here at the table the other day, if you remember, was Norman Kinne. Mr. Kinne, Mr. Macaluso and myself are assistant criminal district attorneys here in Dallas. We've been assigned by Henry Wade to handle this case for the State of Texas.

Immediately to my left is Mr. E. Brice Cunningham.

MR. CUNNINGHAM: How are you, Mr. Sohner?

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[670] sometimes. If you have something that you need to say or a question on some issue I haven't made clear, please stop me and let's make sure that we're clear on things, okay?

A Yes.

Q Mr. Sohner, I feel like it is only fair to you that you know up front what our position, the position of the State of Texas, is in this case. Our position is that we are actively seeking and will continue to actively seek throughout the trial the death penalty for that man at the far end of the counsel table, Thomas Joe Miller-El. We plan to present to the jury and to you, if you're on the jury, a sufficient amount and qualify of evidence, number one, for him to be found

guilty of capital murder and, number two, for the death penalty to be assessed. I feel like it is only fair, as I've said, that you know that going in, that that's what we're going to try to do. I'm not going to try to pull the wool over your eyes. Although I'm a lawyer and have been for a few years, I'm going to try not to talk too much legally or too much lawyer talk and I'm not going to argue with you. I don't think **[671]** anyone is. We certainly don't mean to. Obviously, there aren't going to be any right or wrong answers to what any of us have to ask, Mr. Sohner. We're just trying to find out—I've expressed to you our feelings and we need to know—and Mr. Cunningham and Mr. West and the Judge are going to listen at the same time as I'm talking to you—your feelings on things because that's what is going to count. Obviously, we're trying to find the twelve people best suited to serve on this particular jury in the trial of Thomas Joe Miller-El.

With that kind of introduction and opening, which tends to run a little long sometimes, you had a chance on Monday to fill out a questionnaire. One of the questions on there, as you probably remember, was number fifty-six and that's your feelings about the death penalty. You filled it out at that time and I would like you, if you would, to tell us again today exactly what your feelings are about the death penalty?

A It's a situation that I—until one is put into the position of answering that question and saying I'm going to be one of the

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[723] BILLY J. WAGONER,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Good afternoon, Mr. Wagoner. Mr. Wagoner, let me begin by reintroducing every one here at the table. My name is Paul Macaluso and to my immediate left. is Jim Nelson.

MR. NELSON: Good afternoon, Mr. Wagoner.

Q Mr. Wagoner, you may remember, on Monday when we were all introduced to you, there was a man seated over here. His name is Norman Kinne. Mr. Kinne, Mr. Nelson and I are assistant criminal district attorneys here in Dallas. We work for Mr. Henry Wade, who is the district attorney, as I'm sure you know. We've been designated as the lawyers to represent the State of Texas in this case.

Now, to Jim's immediate loft is Mr. Brice Cunningham.

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[728] question that you want to ask?

A No.

Q If there is something that you wish to add or a statement you wish to make because it was not asked by the right questions, if there's something you need to tell us, then by all means tell us, if you feel it's going to affect your service as a juror, okay?

A Okay.

Q Now, let me tell you where we stand on this case, that is the State. We are actively seeking the death penalty in this case, Mr. Wagoner. In other words, we intend to be able to provide the jury, once it's selected somewhere down the line, with the type and quality of evidence that would convince them beyond a reasonable doubt under the law that the Defendant is guilty exactly as he is charged in this indictment. That's our burden. We have to do that and we intend to do that in this case based on the evidence.

In the second part of the trial when the penalty is determined, once again we intend to be able to provide the jury in the **[729]** case with the type and quality of evidence that will convince them beyond any reasonable doubt whatsoever, which again we have to do, that those three questions

that determine life or death should be answered yes. Like the Judge said the other day, if all the questions are answered yes in the second part of the trial, then the law requires that he assess a penalty of death for the Defendant. That's just our position. The reason I mention that is just to be fair to you and tell you up front where we stand with regard to the evidence. You understand from your other service what the lawyers think really doesn't matter. It's what you, as a juror, thinks and the decisions you make based on the evidence.

Now, let me just ask you, Mr. Wagoner, I know they asked you this question on the questionnaire, but let's just talk about it a little bit again. Let's just have a little informal discussion here, if we can. Tell us how you feel generally speaking, in your own words, about the death penalty and capital punishment. How do you personally feel about it?

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[754] the questions based on the evidence that you hear?

A Yes.

Q Do you see what I'm getting at? In other words, you could be on a jury and you could say, well, I think that person ought to die, you know, if I could vote, I'd probably vote for death, but the law doesn't allow you to do that, does it?

A I wouldn't want it to.

Q The law expects you to simply answer the questions on the basis of the evidence and put aside your personal feelings and just answer the questions. That's all.

A Very much so.

Q Can you do that?

A Yes.

Q Let's shift gears for just a second because I don't have a whole lot of time left. Let me talk to you about a situation—and I'm not suggesting that this would happen in this case, for a minute, but we have to discuss it now. Let's

imagine for a moment that Mr. Wagoner is on a jury. Okay. Just imagine it for a second. A. capital murder jury **[755]** and let's say we've accused somebody of committing murder during a burglary, that's capital murder that we've proven. Do you a understand that we have to prove both the murder and a burglary if we expect you to find him guilty of capital murder?

A Yes, I understand that.

Q But let's say at the end of the testimony, you say, well, I believe he committed murder. They proved that all right. Sure thing, but they didn't prove anything about any burglary or I doubt it was during a burglary. Well, you see, if that were to happen, you have to find that Defendant not guilty of capital murder. Do you understand that?

A Yes.

Q Because we didn't prove capital murder, did we?

A According to the law, you didn't prove it.

Q What did we prove?

A The murder and that was all.

Q Let's imagine for a moment if that were to happen.

Let's say you're on that **[756]** jury and you've just found someone guilty of murder, okay, because that's what we proved. You can forget all about automatic life and automatic death in a regular murder case. Do you understand that?

A Yes.

Q The range of penalty—the law gives you a very broad range of penalty—the judge talked about this the other day—for the offense of murder. It's no longer life or death. It's from five years to ninety-nine years or life. All the law expects you to do to be qualified as juror is this, basically, is to be open-minded, as I believe you are, and be willing to tell us that you will keep an open mind until you would hear the facts of a murder case. Now, you haven't hear any evidence, have you?

A No.

Q And obviously you can't make up your mind until you have heard the evidence, can you?

A No way.

Q And that's all the law expects of you. You can just tell all of us here that you **[757]** have an open mind and you will wait and listen to the evidence and, once all of the evidence is in, you will decide what the proper penalty ought to be based on what you feel is proper and justified and warranted by the evidence and the facts. Can you do that?

A Yes.

Q In other words, if you hear a murder case and you know murder is where one person knowingly or intentionally causes the death of another. That's murder. You've heard the facts of a murder case—and, you know, all murders involve a death, obviously, and they're all going to be bad. Maybe some are just worse than others, okay? The law just says that you be the type of person who would wait and listen to the evidence and, if you hear a case that calls for the minimum—after you've heard the facts, you decide it calls for the minimum punishment, you could give the minimum punishment, if you feel that's the right thing to do and the proper thing to do under the facts as you hear them, okay?

A Yes.

Q Can you do that?

[758] A Yes.

Q If you hear a case, after you've heard all the facts and you follow the law, that you feel calls for the maximum punishment in a murder, would you be able to do that as well?

A Yes.

Q Or obviously anywhere in between, just like you did in that other case?

A Yes.

Q All right. Now, let me just cover one little thing here. The range of penalty, as you know, is from five years to ninety-nine years or life and a $10,000.00 fine. Are you

saying that, if you felt, after you heard the facts of a murder case—you know, some murder case, if you felt that the minimum was the proper thing, could you give as low as five years in the Texas Department of Corrections as the law allows for murder?

A From the facts that were presented, yes, I could.

Q If you felt it was the right thing to do, the proper thing to do, and the just thing to do, after you heard the facts, if you **[759]** said, this is a case—I never thought I'd see one, but this is it—where the minimum is five years, I'll give five years because that's the law?

A Yes, I could.

Q All right, The same thing would hold true for the maximum. If you say, well, this is about as bad as you can get and I believe these facts are horrible and I think he should get the maximum, if the maximum is ninety-nine years or life and a $10,000.00 fine, you could do that, as well?

A I sure could.

Q Obviously, what you're saying is, you would wait and listen to the facts and you and the other jurors would tailor the punishment to fit the crime. Can you do that?

A Yes.

Q Any question about that at all?

A No.

Q Now, just one or two other things here and then these other lawyers will have a chance to talk to you, as well. I think the Judge covered this, but I'm not sure. The law allows that a person can be convicted of murder

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[829] proceedings were held.)

MR. NELSON: We would like the record to reflect that Mr. Gitchaway was a black male excused by agreement.

MR. WEST: Your Honor, I think that the record should reflect that I concur with Mr. Nelson,. the attorney for the

State, that the record should reflect that, that Mr. Gitchaway is a black male.

THE COURT: Ask Ms. Allen to come in, please. Ms. Allen, how are you doing?

MS. ALLEN: Okay.

THE COURT: First of all, let me explain or, apologize to you. We got you here at 1:00 o'clock and we didn't get you in here—into the courtroom until about 2:30. We don't know how long it's going to take to talk to an individual when we start out, so I asked all of you

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[837] THE COURT: Pursuant to my procedure last week, I'll first ask the State if they wish a shuffle?

MR. NELSON: Yes.

MR. WEST: Could we ask the reason for the shuffle?

MR. NELSON: No.

MR. WEST: For purposes of the record, I would like the record to indicate that within the first ten jurors, prospective jurors, four are black. Within the second set of ten prospective jurors, three are black and within the third set of prospective jurors, two are black and the fourth set of prospective jurors, one is black.

THE COURT: I'll grand the State's motion to shuffle. I'll ask someone on behalf of the State and the Defendant to go down and do that as quickly as possible. I'll recess the jury and explain

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[922] VIRGINIA R. SMITH,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q My name, as I was introduced to you yesterday, is Jim Nelson. I'm going to be talking with you this morning. The first thing I want to do is reintroduce all the people here. To my immediate right is Paul Macaluso. Another gentleman, who isn't here, who is home, I find out now, with the chicken pox as a matter of fact, is Mr. Norman Kinne. Mr. Kinne, Mr. Macaluso and myself are assistant district attorneys here in Dallas. We've been assigned to handle this case for the State of Texas. To my immediate left is Mr. Royce West.

MR. WEST: Good morning.

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[1005] Mr. West. The lady—she's been in the witness box for about an hour and a half with some time out when she was out in the hall, I'm going to sustain the State's challenge to this juror for cause. I'm going to note for the record that I think she was questioned very thoroughly. The Court finds that she—her basic problem, as I interpret it, was that she would just simply be unable either to take the oath initially because of her feelings about the death penalty, knowing the result of her verdict would be the imposition of the death penalty by the Court, or if she were sworn for some reason or another, then her ability would be seriously impaired or affected by her deep-seated feelings about the death penalty. Her demeanor on the stand, as you've noted; she did tend to vacillate to some extent. She appeared to be

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[1012] JAMES D. HOLTZ,

called as a Jury panel member, having been duly sworn by the Court to testify to the truth, a whole truth and nothing but the truth; was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Good morning, Mr. Holtz.

A Good morning.

Q Let me begin by reintroducing most everyone who is here. I'm Paul Macaluso. This is Jim Nelson.

MR. NELSON: Good morning.

Q Once the trial beings, another gentleman will be with us and his name is Norman Kinne. Believe it or not, Mr. Kinne is about fifty years old and he has the chicken pox. He's the lawyer, as the Judge said, who is actually going to be presenting the evidence on behalf of the State once the trial begins. We are assistant criminal district attorneys who work for Henry Wade and we've been designated to represent the State, okay?

A Okay.

Q Now, you can see Mr. E. Brice

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[1016] will have to make some tough decisions on this case. We just want to know if the people that we talk to are qualified and suited to this type of case. If they're not, obviously now is the time to let us know. If you have a question, Jim, about anything at any time, ask it.

A Okay.

Q If there is something you want to tell us, tell us, all right?

A Okay.

Q Like I said, bear in mind that no one is going to argue you in or out of a position. Just let us know how you feel.

A Okay.

Q Now, I want to let you know how we feel based on the evidence. We're actively seeking the death penalty, Jim, in this case. We make no bones about it. I'm going to tell you up front as we've told all the other—you're number twenty—what we've let all the other jurors know at this

point, what our position is based on the evidence and that's this: we are actively seeking the death penalty in this case for Thomas Joe Miller-El. **[1017]** I'm not apologizing for it. I don't feel that we have to. We intend to be able to provide a jury in this case with the type and the qualify of evidence in the first part of the trial which would convince them beyond any reasonable doubt whatsoever that Mr. Miller-El is guilty exactly as he has been indicted and charged with the offense of capital murder. All right.

In the second part of the trial, we once again intend to be able to provide the jury, you if you're on it, with the type and the qualify of evidence that would convince a jury beyond any reasonable doubt whatsoever that those three or possibly two questions, whatever, should all be answered yes which, as the Judge explained yesterday, results mandatorially, automatically, in the Judge assessing death. That's all he can receive, either death or life, depending upon the answers to the questions. Any question about that at all?

A No, sir.

Q We just feel that it is only fair to let you know what our position is, that we are taking an active role in this case for the **[1018]** death penalty. You understand that ultimately it's up to the jury?

A. Yes.

Q Now, Jim, you've been asked this question, number fifty-six, how you feel about the death penalty and I know they kind of spring it on you, don't they?

A The Judge warned us about it.

Q They give you three lines here and they ask you how you feel about the death penalty. Why don't you share with us, having had an evening also to think about it or to sleep on it, how you personally feel in your own words, number one about the death penalty, and then secondly about your ability to serve or not serve on this type of a case?

A Okay. if I may, I was raised in Rhode island and that's where I spent my childhood and grew up. New England, I'm sure, is noted as a fairly liberal area of the country.

My view are fairly liberal. Icy position on the death penalty is, I believe in the death penalty in the death of a police officer on duty or, you know, an off-duty officer that is acting as a police officer and **[1019]** that's my personal belief. Other than that, I'm opposed to the death penalty. I believe in life in prison.

Q Okay. Like I say —

A I had a lot of time to think about it last night and that's what I did. I thought about that.

Q Let me back up. You know how lawyers are. Sometimes they sound like they're kind of talking you in or out of something all the time. Even if it sounds like that, I want you to understand that we're not trying to do that. I have to ašk you some questions because it really boils down to this, Jim: We must — that goes for everyone here — rely now on what you say in terms of your potential as a juror. We have to rely obviously on what you tell us. People come down here from all walks of life, with all different opinions, and obviously, like you say, we get to talk to individually because we do want your opinion. I'm not trying to sell you on this, okay, Jim, you can do this or, Jim, you can't do that.

A Yeah. I thought about that last night because I knew that question was going to

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[1024] Jim—I'm going to try and go back over some of the things you say. In the process, if I misstate something—

A I'll correct you.

Q Yes, raise your hand and let me know. In all other circumstances, you believe that a life sentence is a proper verdict?

A Yes, sir.

Q Why do you feel that way?

A I've always felt that the penalty was inhumane. I've never really been comfortable with the death penalty. Rhode Island is—the education there is fairly liberal. In

school we spent a lot of the time dealing with social studies and civil court and criminal law and we rehashed that years and years ago and the opinion that I formed at that time was one that I still hold true. There are a number of reasons that I don' believe in the death penalty. I've just never felt that, barring circumstances where police officers are involved, another human's life should be taken. I'm not a believer in the eye for an eye.

Q Okay. I'm going to let you talk as much as you can because every one has heard

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[1031] similar to that of a police officer.

A Serving a summons?

Q Right. A designated chief or police in an incorporated area or being certified as a deputy sheriff or —

A With the exceptions, like you have mentioned, if a police officer is off duty and is in a bar and gets in a fight.

Q Another category of capital murder, as the Judge said, is murder for hire. Let's say I hire Jim to kill Royce.

A I could support the death penalty in that, in a contract killing, as you said.

Q All right. In other words, both of us would be eligible, me for doing the hiring and him for hiring himself out. How do you feel about that?

A That's a tough one. In a murder for hire case, I could believe in the death penalty for the killer and for the person who hired him.

Q Another category would be multiple killings, mass murders. For example, this thing that happened over here —

A Yes.

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[1045] could render an impartial decision.

Q Regardless of whether it's a murder during a robbery, murder during a burglary, murder during a rape or whatever?

A Regardless of that.

Q Let's shift gears here for just a second and let's talk about a situation that I'm not suggesting could occur in this or any other capital murder case, for that matter, but would like to discuss it with you because it is important. Remember that I said one of the types of capital murders is a murder plus like a murder during a robbery or it could be murder during a burglary, as an example. You say you could serve on that type of a case?

A Yes, sir.

Q Now, let's say you're on a hypothetical jury, murder alleged to have been committed during a burglary. Let's say you don't have any doubt whatsoever in the first phase of the trial that the murder was committed, the Defendant is guilty of murder, no question about it, it's obvious, but let's say you didn't hear any testimony about a burglary or you have a reasonable doubt. **[1046]** There's a doubt in your mind whether the murder actually happened during a burglary. Well, you know if you're expected to find someone guilty of capital murder, we have to prove the murder and the burglary. We've only proven the murder; is that right?

A Right.

Q You can't find somebody guilty of capital murder under those circumstances?

A No, sir.

Q You must find them not guilty of capital murder and find there guilty instead of what the State did prove, which is what?

A Manslaughter?

Q No, murder, just regular murder. Murder is a situation—and I want you to bear this in mind—where one person knowingly and/or intentionally causes the death of another individual and that's done without any legal excuse or

any legal justification. Now, I want to harp on that for just a second because I want to make sure that—you said manslaughter there and we'll talk about that in just a second. You've convicted someone of murder and we're not talking about mandatory **[1047]** death or mandatory life. There's a different range of penalty altogether.

A Right.

Q But I want you to understand what murder is and what murder is not. For example, I said where one person knowingly or intentionally or both causes the death of another individual without any legal excuse or legal justification. Let me give you some examples of what we're not talking about when we're thinking about murder and the range of penalty. For example, if I killed Mr. Nelson over here because I believe he is going to kill me or inflict serious bodily injury on me, I could be charged with his murder, but if you were on that jury, Jim, and you believe that I acted in self-defense or if I were on the jury and I believed that you acted in self-defense, I would find you not guilty of murder just like you would have to find me not guilty of murder because that is a legal excuse, self-defense.

A Right.

Q So when you think about the range of penalty for murder, don't be thinking about self-defense because you don't say, well, **[1048]** that's mitigated. It's not mitigated. It's a defense. Do you see what I'm getting at?

A Yes, sir.

Q The same thing would hold true if you believed I killed Jim by accident. Let's say the circumstances look like murder, but if you believe or have a reasonable doubt, if you're on the jury, that it was an accident, not guilty.

A Right.

Q Not mitigation, not a lower penalty, not guilty. Don't be thinking about that. The same thing would hold true of what you said about insanity. You don't lower the sentence for somebody because you think they're insane or maybe were insane. If you believe beyond a reasonable

doubt or have a reasonable doubt about it that someone committed a homicide that would otherwise be a murder, believed they were insane, not guilty. Any problem with that?

A No, sir.

Q One last category and here's a situation that you mentioned earlier, manslaughter. Let's say you believed the **[1049]** situation where someone killed somebody and it would ordinarily be murder but-they acted under the influence of sudden passion from an adequate cause. For example, a father comes home and finds out that his young child had been sexually molested by a neighbor up the street who is up there laughing about it. He's overwhelmed by what he sees and he flies off the handle, picks up a gun or a pitchfork and runs up the street and kills his neighbor. If you believe that he acted under the sudden influence of passion from an adequate cause and you know that might be an adequate cause because he was so enraged, that's not murder. That's what we call voluntary manslaughter. It's a different range of penalty altogether.

Now, excluding all those things, we do not mitigate the offense. Remember we're talking about a situation where one person knowingly and/or intentionally causes the death of another. There's no legal excuse, no justification under the law. What do you personally feel should be the minimum number of years a person should be required to serve for that sort of offense?

[1050] A Well, that's tough. You know, I don't know what the range of penalties are, but my personal belief is life in prison.

Q Like I said, no one is going to talk you in or out of a position.

A Now, that is my personal belief. I don't see any number of years.

Q Okay. Now, let me ask you this: Bearing in mind what we talked about—and I'm running out of time and I'm not going to be able to go over all these categories with you.

Jim, knowing yourself and in all honesty, being as honest with us as you've been to this point, the law allows a different range of penalty altogether. The law says that the range of penalty is as broad as it can be for any offense, for murder. We want to know how you feel. Do you see?

A Okay.

Q Do you feel you could ever hear facts and circumstances where you feel it would be proper, where one person knowingly and/or intentionally—he knew and intended to kill that individual, absent of those other qualifications, those four that I gave you, **[1051]** would you ever under any circumstances, could any proof ever satisfy you that it would be proper that a person should receive as low as five years in the penitentiary for murder.?

A No, sir, no.

Q You feel very strongly about that, don't you?

A Yes, I do.

Q You said it should be life; is that right?

A Yes, sir.

Q Now, the law does allow you in a murder case to consider—you know; to take into consideration the facts and circumstances, but eliminating those four categories, I gather from what you're saying, five years for a human life under those circumstances would never be proper?

A No, sir.

Q Under any stretch of the imagination?

A No. It would be inadequate in my beliefs.

Q If I ever tried to talc you into that, I would be beating my head against a **[1052]** wall.

A You would be talking to a stone wall.

Q I would be talking to a stone wall because that's the way you feel about it?

A Yes.

Q Like I said, I don't have the right to quarrel with you or dicker with you about your personal feelings, Jim, or

anything else for that matter. That's not our responsibility. Are you saying then, if you were on a murder case, there would be simply no way you could assess a penalty as low as five years regardless of the facts and circumstances in a murder case, knowingly and intentionally causing the death of another individual?

A No.

Q You could give life?

A Yes.

Q But nothing—

A Nothing, along the line of five years. If the person was eighty years old, you could drop a sentence to forty years or something, but essentially life.

Q Jim, you've been very polite and

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[1063] Your Honor.

THE COURT: I have a call in for juror number four. I told her to come at 1:45 and since we still have to talk to the next juror—anything else, Mr. Macaluso? All the voir dire is finished; but—

MR. MACALUSO: I just want to ask Jim if he feels bad about what happened two weeks ago in New Orleans?

MR. HOLTZ: The New England Patriots? I had to cook a lobster. Dinner for some friends of mine.

THE COURT: What says the State?

MR. MACALUSO: The State will exercise a Preemptory challenge.

THE COURT: Mr. Holtz, you will e excused from service in this case. I want to thank you, first of all, for your patience with us yesterday and again today and more important than that for

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[1070] SANDRA L. JENKINS,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Good afternoon, Ms. Jenkins. As I was introduced to you yesterday, my name is Jim Nelson and sitting next to me, again, is Paul Macaluso. There will be a third lawyer, as I believe the judge told you yesterday, involved in this. He is a gentleman by the name of Norman Kinne. Mr. Kinne, who I guess is around fifty years old, has the chicken pox. Because of that he's not here. He's at home trying to get over that. The three of us represent the State of Texas in this case. We're assistant district attorneys and we've been assigned this case by Henry Wade your elected district attorney.

Sitting immediately to my left is Mr. E. Brice Cunningham.

MR. CUNNINGHAM: How are you doing, Ms. Jenkins?

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[1072] McDowell said and that is, we would like you to relax as much as you can with you upon the witness stand and all of us out here looking you.

A All right.

Q As you talk not only to me, but the other lawyers and the Judge will be listening at the same time because the Judge is the one who has to make the final decision on this. I want you to remember one thing and that is, there is no right or wrong answer to anything anybody is going to ask you. Your answers are not going to show you to be a good citizen or a bad citizen or a good person or a bad person. We're just trying to find out about you because the bottom line is, we want twelve people over here who can serve on this type of case. It takes, I think everybody would agree, a special kind of person to serve on this particular case because what we're dealing with is capital murder.

Capital murder has only two possible punishments, either a sentence of life or a sentence of death and that's it. I want you to understand, as we're going into this **[1073]** thing, Ms. Jenkins, what our position is. We, representing the State of Texas, have been and will continue to actively seek the death penalty for that man down there, Thomas Joe Miller-El. We feel like we will be able to present to you the type and quantity evidence for you to convict him, if you're chosen as a juror, of the crime of capital murder and, once he is convicted of capital murder, answer those three questions on the board yes resulting in the death sentence for Thomas Joe Miller-El.

So that's where we are. That's our position and that's we anticipate asking the jury to do once all of the evidence is in. Now, you, yesterday, filled out a fairly lengthy questionnaire and one of the questions on there, number fifty-six, asked about your feeling on the death penalty. I know that this was something you probably weren't prepared for and didn't have a whole lot of time to think about it before you answered the question, so I'm going to ask you again, if you would, to just put in your own words your feelings about the death penalty.

[1074] A I feel that, if it would be proven beyond a reasonable doubt that the death penalty is warranted, that's what sentence should be given. I think I went on to further explain that I think a harsher treatment is life imprisonment with no parole.

Q Okay. Now, I would guess from what you're telling me then, you feel like the death penalty serves a purpose in our society; is that right?

A Yes, very definitely.

Q What type of purpose? What pops into your mind as the purpose of the death penalty?

A The purpose of the death penalty—well, there could be several purposes. It can act as a deterrent. It obviously, from a taxpayer's standpoint, instead of sentencing someone

to life in prison, it's a little less expensive, but really that is not the point even here or there. I'm a little nervous here.

Q I understand. I know it's tough to relax sitting up there and going through these things, but—

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[1094] A I'm still with you.

Q Okay. Now, one thing that we don't expect to happen and we don't anticipate happening in this case, but may happen, is that we don't prove capital murder. Let's say, for example, that we have a case where we've alleged murder in the course of a burglary and we prove to you that the Defendant knowingly or intentionally caused the death of another but we don't prove anything about a burglary, nothing at all. Therefore, we don't have capital murder, do we?

A No, we don't.

Q We just have murder?

A Correct.

Q Okay. The range of punishment for murder, just regular murder, does not include the death penalty in the State of Texas. The range of punishment for the offense of murder is anywhere from five years up to ninety-nine years or life in the Texas Department of Corrections, a sentence of five years up to ninety-nine years or life. In order for you to be qualified to serve as a juror on this case, you have to be able to consider that entire **[1095]** range of punishment if the person is convicted of murder. When I talk about-murder, I'm not talking about self-defense or accident or insanity because, if any of those are the case, then the person is not guilty, okay?

A Okay.

Q If the killing is done in the heat of passion—for example, one incident I've heard talked about would be where a father came home and his four year old daughter had been raped and the neighbor did it. He was standing down the street laughing about it. He goes and gets his deer rifle and

goes down there and shoots his neighbor because he's so enraged by what happened. That's a killing in the heat of passion, but that's voluntary manslaughter. It's not murder. Murder is the knowingly or intentionally causing the death of another individual without any legal justification whatsoever, okay? You have to be able to consider for that type of offense the entire range of punishment.

Now, when I say "able to consider", I don't mean that you have to be able to tell us right now you will give five **[1096]** years or be able to tell us right now that you will give life because you haven't heard any of the facts. You don't know what the facts are .at this point and we can't tell you. Now, would you agree with me that there is a myriad of circumstances in which one person could knowingly or intentionally kill another person?

A Definitely.

Q You could sit here for hours and not think of all the different things that could-be involved in something like that; is that right?

A That's correct.

Q Okay. If you were sitting on a jury and you convicted a person of murder, not capital murder but murder, and after hearing all of the evidence and all the facts and circumstances, if you felt that a life sentence was justified by the facts and circumstances, could you give a life sentence for murder?

A Yes, I could.

Q If after hearing all the facts and circumstances, whatever they may be, whatever may go into this offense of murder, if you believed from listening to all that, hearing **[1097]** all the evidence you're going to hear, that a five year sentence is called for and justified, would you give a five year sentence?

A Yes.

Q Okay. Again, you don't have to be able to sit there right now and even think of what would constitute a five year sentence or what would justify a five year sentence. All

you have to be able to tell us is, if you saw that case, whatever it is, if it calls for a five year sentence, you could give a five year sentence and I believe you're telling me you could do that; is that right?

A That is correct.

Q So you can consider that entire range of punishment, anywhere from five years up to ninety-nine years or life—and there is also an optional fine of up to $10, 000.00 on the end of it. Are you telling me that you could consider that entire range of punishment?

A Yes. As I stated, I think punishment should measure up with the crime.

Q Right, and you're going to keep an open mind and listen to all of the evidence, all the facts of the case and everything else **[1098]** that's brought to you before you make a decision; is that right?

A Definitely.

Q And that's the same thing you're going to do even if he's convicted of capital murder, listen to all the facts and circumstances and all the evidence before you make your decision; is that right?

A Yes, definitely.

Q And that's all we're asking you to do, not to make up your mind right now, but to keep an open mind and listen to everything and then make a decision. Okay?

A All right.

Q Let me touch on a couple of other things just real quickly. Number one, the Judge talked to you about one eyewitness. He said that the law allows us to prove a case in the State of Texas based on the testimony only one eyewitness if you—

MR. WEST: Excuse me, Mr. Nelson. Your Honor—

THE COURT: I don't believe that is one of our jurors, but you might check, Bob. You're not a

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[1127] A As long as the facts were appropriate and I, my own mind, believed that was the justification for the minimum sentence, yes.

MR. WEST: I'll pass, Your Honor.

THE COURT: Mr. Nelson, what says the State?

MR. NELSON: Your Honor, we would be very happy to have Ms. Jenkins serve as a juror in this case.

MR. WEST: We will be very happy to excuse her, Your Honor.

THE COURT: Thank you; Mr. West and Mr. Nelson. Ms. Jenkins, you've been excused from service in this case which means you can leave here and go about your business. You don't have to stay around any longer. If you will give your badge to the bailiff, we would appreciate it, as you leave.

Off the record, Pam.

(Whereupon, there was an

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[1130] COLLEEN MOSES,

called as a Jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Good afternoon, Ms. Moses. How are you doing?

A Fine, and you?

Q I'm doing better than I was yesterday. Let me begin by reintroducing every one here. I'm Paul Macaluso. This is Jim Nelson. You were not introduced to Norman Kinne. He's the third assistant district attorney assigned to this case. He's not here today and he wasn't here yesterday and he won't be here for three weeks because he has the chicken pox.

A Oh, great.

Q Right, and he's about fifty years old. We work for Henry Wade and we are assistant district attorneys and Mr. Wade has designated us as the lawyers to represent the State in this case. Now, the gentleman to my

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[1134] right questions and you just tell us what is on your mind, you will be doing the right thing and so will we, okay?

A Okay.

Q No one is going to play lawyer with you. That comes from a lawyer, by the way, saying that to you. We're not going to try to talk you into anything or out of anything. If there is something you want to tell us; by all means tell us, whether we touch on on it or not, if there is some question you have at any time about anything we talk about, this is the time to ask it. Don't be bashful. I don't think you will be, but relax and just—and if I don't make myself clear—I tend to really start talking fast at times, so if you don't understand me, just tell me to slow down and I'll be happy to do that.

A I'll raise my hand.

Q All right. That's a deal. Now, let me tell you where we stand in this case so we're just as straight forward with you as we've been with the twenty-one other people we've talked to at this point. The State of Texas, Ms. Moses, in this case is actively [1135] seeking the death penalty for Thomas Joe Miller-El, that man right down there. We make no bones about it and we make no apologies for that. The law allows it and we intend to be able to provide a jury, once the trial begins, with both the type and the quality of evidence that would convince a jury—and that would be you; if you're on this jury—that Mr. Miller-El is guilty of capital murder just as he has been indicted by the Grand Jury beyond any reasonable doubt whatsoever. That's done in the first part of the trial.

The second part of the trial, where the punishment is determined, once again we intend to be able to provide the

jury with the type as well as the quality of evidence that mould convince them beyond any reasonable doubt whatsoever that all the questions the Judge, referred to, the two or three questions you would be asked in that phase, should be answered yes. The result of all affirmative or yes answers is that the Judge must sentence Mr. Miller-El to be executed. Do you see what I'm getting at?

A Uh-huh.

[1136] Q Just the same; if there is one or more no answers, the judge must assess a mandatory sentence of life. He has no latitude. The reason I mentioned it is just to put you on notice as to exactly what our position is and what we intend and hope to be able to prove through the evidence once the trial begins and basically, I guess you could say, what the stakes are in this particular case. All right?

A Okay.

Q You understand that ultimately it doesn't matter what the lawyers think, it's what the jury thinks and the decision will be made ultimately by the jury, okay?

A Yes.

Q Now, Ms. Moses, you were asked this question and you knew you were going to be asked it again, I suppose, and that's question number fifty-six and that concerns your feelings about the death penalty. I know you weren't given very much time to think about that before you answered it, but you've been able to sleep on it overnight, haven't you?

A Uh-huh.

[1137] Q Let me ask you, would you share with us, ma'am, in your own words, first your personal feelings about the death penalty and capital punishment generally and then secondly, your ability or your inability to actually serve in a case of this type as a juror?

A Well, I believe in the death penalty, but I think that it would be—whatever decision that I came to at that time, I can't say right off the bat that I think someone should get the death penalty without knowing the circumstances and all the other things.

Q Well, no one will quarrel with you about that at all. In fact, the law—of whether a criminal offense involves the death penalty or it involves a $200.00 fine, the same things would hold true and that is, you must presume any Defendant to be innocent before you hear any evidence at all. Do you understand that?

A That's true.

Q That's the same thing for Mr. Miller-El. It doesn't matter how bad an indictment may sound or how serious a level of

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[1164] Q All right. That's what the law expects of you. Okay. Let's shift gears for just—I didn't forget the third question. That will only come to you if it is raised by the evidence. That just basically asks you if it is a provoked killing or an unprovoked killing. If you decide it is an unprovoked killing, you answer the question yes. If you decide it was a provoked killing, that the deceased did something or said something to provoke the killer, you decide whether the killer acted reasonably or unreasonably. You see, you can answer that question yes or no depending upon the evidence.

A Okay.

Q Let's shift gears—and the Judge is being very patient with me and I need to hurry up here. I want to talk to you about a situation that we're not suggesting would occur in any case, ma'am, but we need to cover it with you. Let's say you're on another capital murder jury. Let's say it's a murder that allegedly occurred during a burglary. That's another type of capital murder. Do you see what I'm getting at?

[1165] A Uh-huh.

Q Now, let's say you don't have any doubt after you heard the first part of the trial that the Defendant committed the murder; but let's say you didn't hear any evidence about a burglary or you had a reasonable doubt about the burglary. If that were the case, Ms. Moses, you understand

that, where the State did not prove both parts of the offense—we have to prove both the murder and the burglary if we expect you to convict him of capital murder—the law says you couldn't convict someone of capital murder if you didn't hear anything about a burglary. Do you see what I'm getting at?

A Uh-huh.

Q In which case you find the Defendant not guilty of capital murder because we didn't prove that, did we?

A No, sir.

Q Instead you find him guilty of what we proved, which is what, murder. Now, if that were to happen and let's say that you found someone guilty of regular murder, then it's no longer automatic life or automatic **[1166]** death. Instead, it's a range of penalty, just like the Judge said the other day, five years to ninety-nine years or life and an optional $10,000.00 fine. That sentence, the number of years, depends entirely on the facts and the circumstances of the murder case. You know as well as I do that there could be an infinite number of situations where one person can murder another. They're all bad, but some are worse than others and the law allows you this latitude to say basically this: That you have an open mind, and I know you do; you will wait until you hear the facts of a murder case and then and only then, once you've heard all the facts, you will decide what the proper penalty should be. Like you may have said earlier or someone said, it's the old cliché about you make the punishment fit the crime. All right?

A Uh-huh.

Q The law wants you to keep an open mind and you tell us that you have an open mind and that you will consider the full range of penalty and assess the penalty somewhere within five years to ninety-nine year or life for murder after you've heard the facts of the **[1167]** case. Could you do that?

A Yes, sir.

Q In other words, if you hear a case to your way of thinking is proper and it warrants and justifies and calls for

a sentence of five years—because that's the minimum—you will give five years for murder. Can you do that?

A Yes, sir.

Q Assuming you heard facts and circumstances that tell you it's the proper thing to do. By the same token, if you hear facts or a situation that you think calls for ninety-nine years to life and you think that is the proper thing to do, once you've heard the evidence—and you haven't heard any evidence yet, have you?

A No, sir.

Q Could you give a verdict of ninety-nine years or life for murder and an optional $10,000.00 fine if you thought that was proper?

A Yes, sir, I could.

Q Or anywhere in between?

A Right.

[1168] Q Any problem with that at all?

A No, sir.

Q I'm out of time, Ms. Moses, but let me just ask you before I let the other lawyers talk to you, do you have any reason whatsoever, whether I've covered it or not, why you couldn't be fair to both sides in this particular case?

A No, sir, I do not know of any reason.

Q Any reason whatsoever why you couldn't give Mr. Miller-El a fair trial here and make the State proves its case beyond a reasonable doubt? Will you make us do that, ma'am?

A Yes, sir, I would.

Q You would keep that open mind?

A Yes, sir, I would.

Q I think you will, too, Ms. Moses. You've been very polite and kind to me.

MR. MACALUSO: I'll pass the prospective juror.

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[1207] PENNY M. CROWSON,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Ms. Crowson, as I was introduced yesterday, my name is Jim Nelson and I'm an assistant district attorney here in Dallas County. The man next to me is Paul Macaluso. Another gentleman who will be involved in this trial, if and when he gets over the chicken pox, which he has, is Norman Kinne. Mr. Kinne is another chief felony prosecutor with our office. The three of us are employed by Mr. Wade and have been assigned to this case to handle it for the State of Texas.

Directly to my left is Mr. E. Brice Cunningham.

MR. CUNNINGHAM: Hi. How are you this afternoon?

MS. CROWSON: Fine, thank you.

Q Sitting next to him is Mr. Royce [1208] West.

MR. WEST: How are you doing, Ms. Crowson?

Q These two gentlemen have been appointed by Judge McDowell to represent the Defendant who is seated at the far end of the table in the light blue suit, Thomas Joe Miller-El. Mr. Miller-El is indicted, as the Judge has told you, for the offense of capital murder, the most serious offense you can be charged with in the State of Texas.

What we're going to do for the next few minutes is try to find out as much about you as we can and about your feelings with reference to the death penalty and some other things. In order to do that, I'm going to be talking to you and asking you some questions. What I would like you to do is just relax as much as you can sitting up on the witness stand with all of us looking at you. I think maybe it's a little easier this way than the normal—have you been on a jury before?

A No, sir.

Q In a normal case, you would sit as you did yesterday morning with the group out [1209] here and be asked the

questions and discuss things out there in front of forty or fifty other people. Our hope is, by doing it this way, because there are some very strong feelings one way or the other and some very difficult issues involved, that you will feel a little bit more comfortable in answering the questions we have for you.

There are no right or wrong; answers to anything I may ask or the lawyers ask you or the Judge asks. We're just trying to find out what you think and how you feel about certain things. If you will be honest with us and answer the questions as openly and as forthrightly as you can, that's all we ask of you. Okay?

A Okay. I'll do my best.

Q As I told you this Defendant is charged with the offense of capital murder. I think it is only fair to you that you know going in what our position is. Our position is we have been and will continue to actively seek the death penalty for Thomas Joe Miller-El, the man at the far end of the table down there. We feel like we will be able to present to the [1210] twelve persons on this jury the type and quality of evidence sufficient, number one, to convince you that he is guilty of the offense of capital murder. Then when we move to the punishment phase to convince you that each of those questions there should be answered yes.

When each of those is answered yes, the result is the Judge assesses the death penalty. We're talk about those a little more in a few minutes. You had a chance yesterday to fill out this questionnaire and one of the questions related to your feelings about the death penalty. I would guess that it was kind of sprung on you without warning. You didn't know what you were coming in here for really and you didn't have much chance to think about it. Now, that you've had time to sleep in it a little bit, would you tell us again in your own. words how you feel about the death penalty?

A I feel that—you want to know what my decision would be or what the crime would have to be before I would go with that or—

Q That's part of it. But number one basically, you said you were in favor of **[1211]** the death penalty or you believe in the death penalty?

A I believe that it depends on how serious the crime is and it would also depend on whether the Defendant could be rehabilitated. It would depend on—the punishment that I would go with would depend on what their past record was and whether I thought there was a chance to be rehabilitated. If I thought there was a chance that the Defendant could be rehabilitated, I would probably not go with the death penalty.

Q Okay. That's fair. But you do feel, from what you say, that under certain circumstances the death penalty is warranted and it serves a purpose then; is that right?

A Yes.

Q What you're telling us is, there are some people that cannot be rehabilitated. By looking at their past acts and what they've done, you could tell if they could not be rehabilitated; is that right?

A Well, for instance if they committed a murder and were paroled from prison and then went out and did it again, I wouldn't

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[1221] you paraphrase that? Does that mean he did not do it under the heat of passion? Are those the words that you used before?

Q No. That's something different. That asks if the deceased, the person killed, provoked the killing in any way. Did he do something to provoke his own killing. If he didn't, you have to answer that question yes because the killing was unreasonable. If he did, you would have to make a decision whether the killing was reasonable in response to any provocation.

You've said that you believe in the death penalty under certain circumstances. How long have you felt that way?

A Probably—I don't consider myself being that old—probably not since college. I probably didn't make up my mind. I'm not one hundred percent certain that my mind is made up at this moment, but I would say that I pretty much—maybe since I was twenty-one or twenty-two.

Q Okay. So five or six years, something like that?

A Uh-huh.

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[1224] for?

A They're asking whatever the Defendant did, he did it knowing full well when he did it that it was going to kill the person that he was aiming the gun at.

Q For example, if I was standing here and I pointed a gun at Mr. Macaluso's head and pulled the trigger, it would be pretty deliberate that I was planning to kill him when I did that, but if I shot at his foot and somehow it bounced off the floor and off the wall and came back and killed him, then that might not be something deliberate?

A Uh-huh.

Q That's a pretty wild example, but I think that's basically what we're talking about. Number two is a little bit more involved. "Is there a probability that the Defendant would commit criminal acts of violence that would constitute a continuing threat to society?" What do you think that question is asking?

A Whether there's a chance that the Defendant could be rehabilitated.

Q When you say "rehabilitated", what **[1225]** do you mean?

A Well, that there would be a chance that this person would get out of prison and intermingle with society again, that there would be a chance that he could do that successfully without committing the same or other serious crimes again.

Q Okay. I think from what you're saying, probability to you means a chance; is that right?

A Well, a pretty strong chance. Probability meaning pretty much beyond doubt.

Q What is beyond — that he would not commit an offense beyond a doubt or he would commit another offense beyond a doubt?

A Let's see. This is asking whether you believe that he would probably commit the same crime again if he had the same chance.

A Okay. Now, it doesn't necessarily say he would commit another murder. It says criminal acts of violence. Do you see a distinction there?

A Yes.

Q For example, would you agree with me that rape might be a criminal act of **[1226]** violence?

A Yes.

Q Or a robbery?

A Yes.

Q Or an assault of some kind?

A Yes.

Q For example, even if I took a baseball bat and hit Mr. Macaluso up side of the head with the baseball bat, would you agree with me that's a criminal act of violence?

A Yes, if you did it on purpose.

Q Okay. You're saying that we would have to prove to you that it would be almost certain that he would do something like that again?

A Well, before I had to answer these questions would I know what the Defendant's past history has been or would I have no indication as to that?

Q Let me talk about that just a little bit. You may hear about past history. You may also hear just about the offense, what he did before the offense, what he did during the offense and what he did after the offense.

[1227] For example, you might be able to know before the offense whether he was involved in planning the offense or not. Did he plan it or was he just a bystander? Was it a spur of the moment thing? During the offense, what role did he play? Was he a leader or was he on the fringes as a lookout kind of thing? Was he giving orders or was he following orders? Was he involved or was he not really involved? Could he have done something short of what he did? In other words, did he have to commit whatever violent act he committed or could he have done something less? After the offense, was he remorseful? Did he feel bad about it? Was he sorry for what he had done or was it just like slapping a fly, just another day at the office, no big thing to him? You can hear things like that. Would you agree with me that you might be able to make a decision on question number two from knowing things like that?

A Yes.

Q Okay. You would also like to hear, if you could, about past history?

A Yes, past criminal record. Is that what you're talking about?

[1228] Q Right.

A That's what I'm talking about.

Q That's what we want to know, is what you're talking about. Any any other criminal acts after the offense took place, also, all those things would be a help to you; is that right?

A Yes.

Q Do you feel like you could use that type of evidence to answer question number two?

A Yes.

Q You hesitated?

A Well, probably because I know I'm not supposed to, but I couldn't help but let those things affect my opinion.

Q Why do you think you're not supposed to?

A I don't know. I would just assume that you would go just strictly by the evidence and not —

Q Anything you hear; if you're sitting on the jury, anything and everything you hear will be evidence except what they lawyers say. What I say now and what the Judge **[1229]** says and what anyone says during the trial is not evidence. You will be able to consider anything that comes from the witness stand. That may be the facts of the case before the offense, after the offense, prior record, if he has any, other criminal acts, if there is any evidence of that. You can hear all of that and you can consider all of that to make a decision on question number two. Okay?

A Okay.

Q. Is there one of those that you feel would be more important than the others in answering question number two, one type of evidence that would be more important than the others?

A I don't know. I would have to think about it. I would have to have more examples. You talked about whether he was the leader or the follower or whether he could have — there was something lesser that he could have done. Something like that would definitely be an important part.

Q Okay. Now, you understand that question number two says nothing about rehabilitation?

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[1252] lawyers here at the side for a second.

(Whereupon; there was an off-the-record discussion between counsel and the Court, after which the following proceedings were held.)

MR. NELSON: Your Honor, the State will exercise one of its challenges.

THE COURT: Thank you, Mr. Nelson. Ms. Crowson, you will be excused from service in this case which means you may leave here and go about your business and give

your badge to the plaintiff. I want to thank you for your service and your patience with us. It's been along day and we're still working and we're going to be working for a while longer. I appreciate your patience with us. Thank you.

Ms. Smale, I won't take but a second to say what I want to

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[1255] GWENDOLYN M. SMALE,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Good late afternoon, Ms. Smale. We're all getting a little bit punchy here.

A That's why I wondered if every one is going to look alike.

Q I will get right to the heart of the matter by reintroducing every one here. I'm Paul Macaluso and this is Jim Nelson. When the trial begins, we will be joined by Norman Kinne who, you being a doctor's wife can appreciate the fact that Mr. Kinne is about fifty years old and has the chicken pox.

A I had them at thirty, so I can sympathize with him.

Q He's going to be out for about two or three weeks, so this jury selection better take at least that long.

To Jim's immediate left, ma'am, is Mr. E. Brice Cunningham.

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[1258] questions, we'll be doing our job and you will be doing yours. No one is going to try and talk you into anything or out of anything. Just let us know how you feel.

If there is something that we don't touch on that you feel is important, you tell us. If you have a question about anything, by all means ask it and we'll do our best to answer it.

Let me tell you what our position is based on the evidence. The State of Texas is actively seeking the death penalty in this case for this Defendant. We make no bones about it. The law allows for it. There is no question about that. We intend to be able to provide a jury, once it's selected, and it could mean you, with both the type and qualify of evidence that would convince them beyond any reasonable doubt that the Defendant is guilty .of capital murder exactly as set out in this indictment. That's done in the first part of the trial.

Then again in the second part of The trial, we intend to provide a jury with the type and quality of evidence that would **[1259]** convince them beyond any reasonable doubt that all the questions should be answered yes which, as you know from what the Judge said yesterday, would require the Judge to assess a sentence of death for Mr. Miller-El. That's the reality of this situation. Although we've been kind or cutting up here a little bit, bringing it back to home as to where we are and what this is all about, it's simply that. We intend to be able to provide—

THE COURT: Ms . Smale, let me ask you, if you would, ma'am, to step down and go in the jury room for a second and let me take care of a law matter and we'll get you right back on the witness stand.

(Whereupon, Ms. Smale left the courtroom, after which the following proceedings were held.)

THE COURT: The Defendant needed some medicine.

(Whereupon, Ms. Smale returned to the courtroom **[1260]** and the following proceedings were held.

THE COURT: Go ahead, Mr. Macaluso.

Q Back to what I was saying, the reality of the situation is—I don't need to tell you that it is a very serious situation that requires certainly the utmost concern of every one who would be a prospective juror in this type of case.

Strong feelings, of course, enter into this type of situation, to a large degree the penalties and the nature of the offense. You were asked this question, number fifty-six, how you feel about the death penalty and Lord knows you were given precious little time to really reflect on that. You've had overnight, so let me just ask you if you would share with us—because we're all interested, of course. Could you share with us in your own words how you feel about the death penalty and capital punishment basically and generally speaking and then your ability to actually serve on this type of jury or your inability to serve, if you feel you cannot?

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[1282] will only receive the first two questions in which case you answer those. Two yes answers it's death mandatorially. That question basically asked you whether or not when he killed him was he provoked to kill him. If you find that there was no provocation, of course, you answer the question yes. If you find that there was something that the victim did or said to provoke someone into killing him, even though it's not a defense, you decide whether it was reasonable or unreasonable for the Defendant to kill this individual. If you find that it was unreasonable, you answer the question yes. If you find that it was reasonable, you answer it no. That's a confusing sort of question; isn't it?

A Well, the way it is stated, but I assume what you're saying is, was the killing by the Defendant based on just cause by an act of the deceased.

Q Right. In any case, you can see how these question can be answered yes or no depending on the evidence?

A Right.

Q Let's shift our gears for just a **[1283]** second and go back to something we talked about earlier and that's a situation where you would be called upon to consider the range of penalty for the offense of murder. Remember that I said regular murder? I'm not suggesting, Ms. Smale, that this would ever occur in this case or any particular case, but it's

something like the other things we've been talking about. We have to discuss it.

Let's say for example, Ms. Smale, you're on a hypothetical jury. It's a capital murder indictment, but it alleged that it is a murder during a burglary which is a type of capital murder, murder plus burglary. Let's say you don't have a single doubt whatsoever nor do the other jurors that the Defendant committee murder. You didn't hear any testimony about any burglary or you have a reasonable doubt about whether it was done during a burglary. Do you understand that for us to expect you to convict someone of capital murder, we have to prove both the murder and the burglary and we didn't do that, did we?

A You said you didn't.

Q Okay. In which case, you couldn't **[1284]** find him guilty of capital murder. You would find him not guilty of capital murder because we didn't prove capital murder. You found him guilty of what we proved which is what? Murder. All that does is change the range of penalty back. It is no longer mandatory life or death. Instead it's that range of penalty we talked about earlier. It's as broad as any range for any offense under the laws of this state. Broad, I think, because the legislature had in mind what we all know and that is, one person can kill another. In other words, commit murder under a myriad, and infinite number, of facts and situations. The law allows a juror, a jury as a whole, to take into consideration all of the important surrounding facts and circumstances in deciding what the proper penalty ought to be. It's kind of like tailoring the punishment to fit the crime. It's a cliché, but it's true. That's what the law expects you to do.

Now, I know you haven't heard any testimony at all on which to base a decision, have you?

A No.

[1285] Q And that's what the law says. The law expects you, to be a qualified juror on a murder case, to number one tell us that you can follow the law in regard to what

the range of penalty is. Secondly, that you will keep a completely open mind and wait until you've heard something on which you can base a decision and that is the facts, right?

A Right.

Q If you hear a fact situation to your way of thinking that calls for and warrants and basically justifies a particular number of years, that's what you will give after you've heard the evidence. Fair enough?

A All right. I think that's what is on the questionnaire.

Q In other words, even though you can't consider—or let's say conjure up in your mind now a fact situation that calls for the maximum or a fact situation that calls for the minimum, you're open-minded. You're open-minded, aren't you?

A Yes.

Q You haven't heard any evidence and you will just tell us that you will wait and **[1286]** listen and if you hear a fact situation that, to your way of thinking, is proper and calls for and justifies the minimum and the minimum is five years you'll give five years if you feel that's what is called for. Can you do that?

A Yes.

Q If you hear a fact situation that calls for the maximum, ninety-nine years or life, and you think that's the proper thing to do, you would actually vote for ninety-nine years or life and even add on the $10,000.00 fine, which is an option. Can you do that?

A Yes.

Q Bear in mind that doesn't mean that you have to sit there and think of a fact situation or you're being committee to anything. All you're saying is, I know what the law is and I'll follow the law whatever that is. I will wait until I hear the facts and I will do what is proper once I've heard the facts.

A That's right.

Q Any proplem with that at all?

A No.

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[1369] RONNIE LONG,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Good morning, Mr. Long. As I was introduced to you on Monday, my name is Jim Nelson. Sitting next to me is Mr. Paul Macaluso. There is one more gentleman who will be involved in this trial when we start the evidence and that is a man by the name of Norman Kinne. Mr. Kinne is about fifty years old and he is home with the chicken pox and has been for a few days and probably will continue to be for a few more.

The three of us, Mr. Kinne, Mr. Macaluso and myself, are assistant district attorneys assigned by your elected district attorney, Henry Wade, to handle this case for the State of Texas.

Immediately to my left is Mr. E. Brice Cunningham.

MR. CUNNINGHAM: Good

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[1372] in—I feel like it it only fair that we tell you our position in this case. The State of Texas, meaning Mr. Kinne, Mr. Macaluso and myself, is actively seeking the death penalty in this case for Thomas Joe Miller-El. We anticipate that we will be able to present to a jury the quantity and type of evidence necessary to convict him of capital murder and the quantity and type of evidence sufficient to allow a jury to answer these three questions over here in the affirmative. A yes answer to each of those questions results in an automatic

death penalty from Judge McDowell. We'll talk more about that in a few minutes, but that's our position.

You had a chance on Monday to fill out a questionnaire and one of the questions on there was your feelings about the death penalty. I would guess that was kind of a surprise, that this whole thing was kind of sprung on you on Monday without much warning and you didn't have a whole lot of time to think about your feelings about things. You've had a couple of days now, a couple of nights to sleep on it. Would you tell us again in your [1373] own words how you feel about the death penalty in the State of Texas?

A Do you mean whether I'm for or against it?

Q Are you for or against it and do you feel it serves a purpose in our society?

A I do feel it serve a purpose as a deterrent toward crime.

MR. WEST: I can barely hear you, sir.

A I do feel that it is a deterrent toward criminal activities.

Q Mr. Long, is this something that you had thought about before Monday?

A Yes.

Q Is this a belief that you have held for quite a period of time?

A Yes.

Q Okay. I see you're married; is that right?

A Correct.

Q Would you venture a guess as to how your wife feels about the death penalty?

A I really haven't thought much about that, but I would not think she would be

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[1390] burden of proof on proving the case in the first place; the capital murder offense?

A Right.

Q Okay. Mr. Long; I want to talk to you about one other thing that we don't anticipate will come up in this case, but it is always a possibility. That is—let me take a different situation. Let's assume we have a murder that we have charged, a murder being committed in the course of a burglary. That would be a capital murder charge according to the laws in the State of Texas, right?

A Right.

Q Let's assume that we proved to you that the Defendant knowingly or intentionally caused the death of another individual, but we don't bring you any evidence whatsoever of a burglary. Now: we haven't proved capital murder then at that point, have we?

A No, sir.

Q All we have proved is murder?

A Right.

Q If all we prove is murder, the death penalty is no longer an option in that **[1391]** particular case. The range of punishment changes drastically. The range of punishment for under is any where from five years up to ninety-nine years or life and a fine of up to $10,000.00. That's the widest range of punishment for any offense under Texas laws. Would you agree with me, Mr. Long, that there are just a myriad of circumstances under which a murder can be committed, all kinds of factors that could come into it and be surrounding circumstances in the killing of another human being?

A Yes, sir.

Q Okay. Now, I want you to be clear about one thing. We aren't talking about self-defense, then the person is not guilty of murder. If the jury finds that it is an accident, the person is not guilty of murder. If the jury finds it is a killing under the heat of passion, he's not guilty of murder. He's guilty of voluntary manslaughter. Those are all different. What we're talking about is knowingly or intentionally taking the life of another human being without any legal justification or **[1392]** excuse. Other factors can come in from all over the place. All kinds of other circumstances can enter into it, but no legal justification or excuse. Are you with me so far?

A Yes.

Q In order for you to be qualified to serve as a juror on this case, you have to tell me, Mr. Macaluso, the lawyers for the defense, and the Judge that you can consider the entire range of punishment for the offense of murder. Now, when I say consider; I don't mean you have to be able to tell us right now I'll give five years. You don't have to be able to tell us right now that you would give life because you haven't heard any of the facts in this case and obviously you can't make a decision until you've heard all of the evidence you're going to hear. Would you agree with me on that?

A I do.

Q What we're asking is, if you feel, after haring all the evidence, that the person is guilty of murder, if the facts and circumstances justify it and call for it in **[1393]** your mind, could you assess a ninety-nine year or a life sentence for the offense of murder?

A Yes.

Q Let's go to the other end. If after you've heard all of the evidence and you found the man guilty of knowingly or intentionally causing the death of another individual without any legal excuse or justification—you've now heard all the evidence you're going to hear on the guilt or innocence and on punishment—if you feel, after hearing all of that, that the facts and circumstances justified and called for. In your mind, a five year sentence, could you consider and give a five year sentence for the offense of murder?

A Yes, sir.

Q If the facts and circumstances justified it after you heard all of the evidence; is that right?

A Yes.

0 So all we're asking you to do is keep an open mind as to the entire range of punishment until you've heard all of the evidence. Do you feel like you could do that?

[1394] A Yes, sir.

Q Okay. Now, we don't have to prove to you, Mr. Long, in either phase motive or premeditation. I think the Judge told you that the other day. Those are not issues in a murder case in the State of Texas. You hear about them on TV a lot. I guess maybe they're issues in California, but they aren't here. We don't have to prove why the killing happened, although we may. It's not a burden. We don't have to prove to you a motive. We don't have to prove to you that it was premeditated. Do you have any problem with that?

A No, sir.

Q The law also allows us to prove a case with a single eyewitness. Would you agree with me that there are cases like that, a purse-snatching or a rape, where there may only be the person that did it and the victim of the crime there at the time?

A Yes, sir.

Q That's why the law allows us to prove a case with only one eyewitness. If you believe that eyewitness beyond a reasonable doubt as to each element of the offense, you're

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[1437] LINDA M. BERK,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q. Ms. Berk, let me begin by reintroducing every one here. I'm Paul Macaluso. This is Jim Nelson and when the trial itself begins, you will be introduced to a gentlemen by the name of Norman Kinne. He's not here because he has, of all things, the chicken pox.

A. Sounds like he teaches first grade.

Q. He's about fifty years old, too, and we're giving him a lot of ribbing. He will actually be presenting the evidence to the jury once the trial itself begin. We are all three assistant criminal district attorneys here in Dallas. We work for Henry Wade who is the district attorney, as I'm sure you know. We've been designated as the lawyers to represent the State.

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[1441] one and you're not there to—if you just tell us exactly and precisely how you feel as honesty as you can tell that's all that that's all any once ask and you'll be doing your job as I said earlier, Now, if you have a question about anything, then by all means ask it. If you have something that you would like to tell us, chime in at anytime because your opinion, really—I'm not trying to patronize you. Your opinion is the most important opinion here right now. They've all heard me speaking for a couple of weeks. They know me. They don't need to hear from me. They need to know how you feel.

Now, let me tell you exactly what our position is, Ms. Berk, with regards to this case. You know that Thomas Joe Miller-El is charged with capital murder. From what you may recall the judge saying on Monday, you know that a person who is convicted of capital murder can receive only on of two possible penalties. One is a sentence of death, which is carried out by the execution of an individual through the injection of a lethal substance. The other sentence is life. There **[1442]** is no in between for a person convicted of capital murder.

I don't mean to be unnecessarily graphic about this, but I think it is only fair that you and any other juror we talk to—to let you know exactly what the stakes are and to acquaint you and familiarize you as much as we can with what really is going on here.

Let me start by saying this: The State of Texas, that is, Mr. Kinne, Mr. Nelson and myself on behalf of Dallas County are actively seeking the death penalty for Thomas Joe Miller-El in this case. We make no bones about it. That's our position based on the law and based on the evidence. We intend to provide a jury in this case, once it is selected, with the type and quality of evidence that will convince them beyond any reasonable doubt whatsoever in the first part of the trial that Mr. Miller-El is guilty exactly as he's been indicted of the offense of capital murder.

Then in the second part of the trial, we intend to be able to provide a jury, once it is selected, with the type and qualify **[1443]** of evidence that would convince them beyond any reasonable doubt that the questions that will be submitted to the jury should be answered in each case yes which, as you may recall from what the judge said yesterday, would require the judge then to assess mandatorially a sentence of death by lethal injection. Do you see what I'm getting at?

The reason I say this is, I've read your questionnaire and I've got kind of a handle on how you feel about things. We'll discuss some things in just a minute, but I want you to understand, what I think you already know, clearly and that is, this is not something that you're reading about. It's not something you're discussing over coffee with friends when you're debating over whether it may be. You are in the thick of it, so to speak. Because we have this opportunity now to talk to prospective jurors like yourself, we get to find out whether or not just qualified generally for jury duty, but whether or not they're suited for this type of case.

I know I'm running on here, but **[1444]** we've talked to twenty-six people in this case in preparation for this jury selection and we have two jurors so far and one is kind of iffy because of a medical problem. If you just look at it arithmetically, it's very very small percentage of the people that we talk to that are ultimately both qualified and suited for service on a capital case. I think you know why. You know why, don't you? So what we need to do is see how you feel and see whether or not you're qualified. I'm sure generally

speaking you're probably qualified for most any type of jury service, but you may not be suited for this type of service. Like I said earlier, arithmetically so far, if you go on the basis or the number we've talked to and the number of jurors we have, one in thirteen of you. That doesn't make the twelve other ones who are not going to serve on this jury bad citizens or anything like that. Do you understand that, of course?

A Yes, sir.

Q There's no doubt about that. It just means for one reason or another they simply were not suited or qualified for this **[1445]** type of jury service. That's what we're about here and that's what we need to talk to you about.

Now, I notice on your questionnaire with regard to question number fifty-six where you were asked how you feel about the death penalty. I sense, at least, just from the way you're kind of fidgeting up there, you've got some real strong feeling about this?

A. I came to grips with that yesterday.

Q. Tell us, if you would, in your own words how do you feel about the death penalty and then, secondly, your ability, in all honesty, or inability to actually serve on a of case of this type and actually render a decision that would result in the execution of another citizen?

A You're going to have to excuse me because I'm getting a little emotional, okay?

Q. There's no need—okay.

A. I know, but you see I have never come to grips with this before. I remember especially during the Manson trial—I lived

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[1480] DOMINICK DESINISE,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Good afternoon, Mr. Desinise. As I was introduced to you on Monday, my name is Jim Nelson and sitting next to me again is Mr. Paul Macaluso. As the trial moves onto the stage where we actually present evidence another man will be joining us and his name is Norman Kinne. Mr. Kinne, who is about fifty years old, is home with the chicken pox and has been for a few days and I guess will continue to be for a few more. The three of us are assistant district attorneys in Dallas. We've been assigned by Mr. Henry Wade, your elected district attorney, to handle this case for the State of Texas.

Sitting to my immediate left is Mr. E. Brice Cunningham.

MR. CUNNINGHAM: How are you this afternoon?

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[1483] that is, there are some difficult issues and not everybody is suited to serve on this type of jury. That's what we're trying to find out, is whether you're the kind of person that is not only qualified, but suited to serve on his type of jury.

I feel like you have a right to know right up front what our position is. Mr. Kinne, Mr. Macaluso and myself, representing the people of Dallas County and the state of Texas, are actively seeking the death penalty for Thomas Joe Miller-El. We feel like we will be able to present to a jury and to you, if you're on that jury, sufficient type and quantity of evidence to convince you that he is guilty of capital murder and the sufficient type and quantity of evidence to convince you that the three questions there on those boards should be answered yes, the result of that being the death penalty. If each of those questions is answered yes, Judge McDowell has no option whatsoever but to assess the death penalty.

We do that with the anticipation that, when the death penalty is assessed, at **[1484]** some point Mr. Thomas Joe Miller-El—the man sitting right down there—will be taken to Huntsville and will be put on death row and at some point taken to the death house and placed on a gurney and injected with a lethal substance until he is dead as a result of the proceedings that we have in this court on this case. So that's basically out position going into this thing. I think it is only fair that you know that. That's all the introductory type of talk I'm going to do.

You had a chance on Monday to fill a questionnaire and on of the questions on there, number fifty-six, asked you your feelings about the death penalty. You put that you do not believe in the death penalty.

A. I did.

Q. Can you kind of put in your own words your feelings about the death penalty?

A. We're all big guys. We all talk, yes, if somebody did something, we're going to do out and we're going to kill them, but when you make up your own mind, even though I'm a Vietnam vet and I was not in a combat zone, I was in construction with the engineers, I've seen **[1485]** death. I've smelled death. But to take a person's life and to actually take a person's life, you would have to be a — you know, to say — I don't know that gentleman. I don't know all the facts about him and I don't know how he was reared and how he grew up and the circumstances that led him to do that fatal murder at that time or whatever he supposedly has done — capital punishment is murder, I suppose?

Q Yes.

A I'm not aware one hundred percent of what he did and how he was reared. Sometimes environment brings you to do things like that and I don't know. I can't play God and say that — in my mind, not even knowing the defense, the Defendant or whatever he is — I should take his life.

Q Well, let me cover just a few things with you —

A Now, outside in the field now, I would say — you know, with the guys all talking — ah, yes, let's do away with all these kinds of people, rapists, murderers. It's easy to say out there, but when you're in

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GENE R. HINSON,

[1640] called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Can you hear me all right?

A Yes.

Q I tend to let my voice drop and I can get rambling pretty fast, so if I do, slow me down, all right?

A Yes.

Q Mr. Hinson, let me begin by reintroducing every one here. My name is Paul Macaluso. This is Jim Nelson.

MR. NELSON: Good afternoon.

Q Another lawyer will be joining us once the trial begins. His name is Norman Kinne. Mr. Kinne has the chicken pox. He's about fifty years old, too, so we've been ribbing him, you know, as kind of a late bloomer. We're the lawyers for the State and we're all assistant criminal district attorneys, as I'm sure you may recall from the

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[1645] not be suited because of their personal feelings about the death penalty. Do you see what I'm getting at?

A I understand.

Q That's why we have to go through this laborious and tedious and somewhat repetitious process to get to know somebody and know more about them and see if

they're really suited for this type of case. In the final analysis, Mr. Hinson—well, let me just put it this way at the very outset so you will know exactly where the State stands with regard to he reality of this particular case and this particular Defendant.

We are actively seeking the death penalty in this case for Thomas Joe Miller-El, the man seated right over there. In other words, we know that the law does allow for the death penalty, legal execution. We intend to be able to provide a jury, once it is selected, with the type and the quality of evidence that would convince them beyond any reasonable doubt, as the law requires, that Mr. Miller-El is guilty of the offense of capital murder just exactly as he is charged in this indictment.

[1646] Then in the second part of the trial, we intend to be able to provide a jury, once it is selected, with the type and the quality of evidence that would convince them beyond any reasonable doubt that all the questions that will be submitted, the two or three questions, should be answered yes which, as you know, will result mandatorially, automatically, without any question or reservation, in the Judge sentencing Thomas Joe Miller-El to be executed by lethal injection down in Huntsville, Texas.

The reason I go through that is, of course, to tell you in all fairness, as we've done every one else that we've talked to, exactly where we stand based on the evidence. Of course, ultimately it is up to the jury to decide based on the evidence and the law. We feel it is only fair to every one on notice as to where we stand.

Of course—as you well know, you're thirty—nine years old. You've been around long enough to know that there was a time in this country when people were being assessed death sentences, but no one was being **[1647]** executed and there was perhaps a time when any juror could probably, in their minds, think, well, it's just not a real thing. We might sentence someone to die, but they haven't executed any one in ten, fifteen or twenty years in some states. That's not the way it is any longer. I think any one—in all fairness to them

and the realization—should realize and expect that if the death sentence were returned in this case, Mr. Miller-El will be executed at some point in time under the law. As you know, that's by lethal injection here in Texas.

Now, with those remarks out of the way, let me just ask you—I know you were asked this question—and then we're going to let you talk a little bit. Like I said, they've heard enough of me. Question fifty-six asks you do you believe in the death penalty and you had precious little time to really think about it, I suppose, and express yourself; but you've had two or three days to sleep in it, I guess; and think about it and mull it over in your mind. Let me ask you to share with us in your own words your feelings **[1648]** about the death penalty and your ability or your inability, because of your personal feelings, to actually serve on this type of a jury?

A Well, I believe I put on the form there that I didn't agree with it for both moral and religious reasons. Not that I've done any tedious investigation, but from what I've—just from the media and what I've read on my own—

THE COURT: Excuse me just a minute.

(Whereupon, an off the record discussion was held.)

THE COURT: That was Mr. Weaver. I wanted to explain to him what had happened. I'm sorry, Mr. Hinson. That was right in the middle of your explanation. Go ahead.

A Well, I was just explaining from a lot of the data that I've read and so forth, it hasn't proved to be that much of a deterrent anyway. Then not only because of that, but just my own personal beliefs in the matter.

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[1787] what he wanted to do at the time that he had the right to shuffle and he did that. Then I turned around and did it according to how the defense wanted it done. Now, Mr. Nelson and I talked about it and he had made some mention down in the jury room that I was intentionally doing something and then he backed up off of that. Now, he is bringing

it in under the guise as though just because sixteen jurors and one position on the first shuffle are in the same position on the third shuffle that it wasn't done randomly or the shuffle wasn't done correctly.

Mr. CUNNINGHAM: Your Honor, the point is, what this is really all about is that jurors number one, two, three, four and eight and fifteen on the first list were all black, that when they went down and shuffled the first time, the black jurors were number **[1788]** nineteen, twenty-six, thirty-six, thirtyseven, thirty-eight and thirty-nine, that after the second shuffle those same six blacks are now one, two, three, four, seven and fourteen. That's what this is all about.

MR. NELSON: Judge, I'm going to object to Mr. Cunningham telling the Court what this is all about. I voice the State's objections—the Court can tell from the procedure, and I would like the record to reflect, that I voiced my objection to this last array before I knew what it was. I voiced my objection to the shuffling down in the central jury room while it was going on and before I knew what order the jurors would come up here in.

MR. WEST: Judge, Mr. Nelson was standing right by me when I shuffled. Now, he cannot dictate the number of times that the

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[1866] JEANETTE BUTLER,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Good afternoon, Ms. Butler. Let me begin by reintroducing every one here. I'm Paul Macaluso. This is Jim Nelson. Another lawyer, a district attorney, will be joining us once the trial begins. His name is Norman Kinne. We haven't seen Norman in a while because he has the chicken pox. He's about fifty years old and he's been disabled, of

course, for about two weeks. It makes a difference at that age.

The gentlemen to Jim's immediate left is Brice Cunningham.

MR. CUNNINGHAM: How are you, Ms. Butler?

Q The gentlemen who was just in here a moment ago is Mr. Royce West. They were introduced to you this morning, also. We are assistant district attorneys who represent the

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[1870] position or try to talk you out of a position. Just tell us how you feel about anything and you'll be doing your job as a prospective juror.

What we're trying to do here is find twelve people who are best suited, twelve that we both agree on, both sides agree on, and can actually serve on this type of case because not every one can. I mean, you're number thirty-eight and we only have two jurors. You can see arithmetically how few people are suited to serve on this type of a case.

Now, let me tell you what our position is just in fairness to you going into this sort of a situation. Ms. Butler, we are actively seeking the death penalty in this case for Thomas Joe Miller-El and we make no apologies for it. We know that the law allows for it under certain circumstances and we intend to be able to provide a jury—and that would mean you if you're on this jury—the type and quality of evidence that would convince this jury beyond a reasonable doubt in the first part of the trial that Thomas Joe Miller-El is guilty of the offense of capital **[1871]** murder. That's our responsibility.

Then in the second part of the trial, to provide the jury with the type and quality of evidence that would convince them that the questions that the Judge would give you at the end of the trial, those three questions there, should be answered in each instance yes, yes, yes. You know that the effect of three yes answers—what is that?

A The death penalty.

Q That's right, automatically. You might as well write death in there. Three yes answers dictates to this Judge, under the law, what he must automatically and definitely do. Now, the reason why I say that is just to put you on notice. You know a lot of people come down here and they're kind of caught up and they don't realize—you know, they think they're going to be on a shoplifting case or a marijuana case or a burglary case and here they are. They're sent down to a jury room where they're talking about death and capital punishment. You see, it's no longer, like it may have been, where you read about something or you talk about it with your husband or **[1872]** people you work with or your friends, about how you feel about the death penalty. You're in the thick of it basically. I don't know of a better way to put it. We just want you to know what the stakes are here and we intend to provide this jury with the type of evidence that ultimately will result in convicting this man and ultimately result in this man and being taken down to Huntsville, Texas, strapped to a bed, a hospital bed, taken [illegible] a room where they will put a needle in his arm and they inject him full of a lethal substance that is going to end up killing him under the law.

Anyone who comes down here, like yourself, as a prospective juror, just in fairness ought to know what the stakes are and what you would be called upon to do under the law based on the evidence if you serve on the jury. It kind of goes back to what the Judge said. The Judge it's kind of like—I know he said this to other jurors that he talked to—it's kind of like you're given a job description. Just like this job you're taking now, I'm sure you wanted to know what it entailed, didn't you?

[1873] A Uh-huh.

Q If it wasn't what you set out for, then you're not going to sign up for it, are you?

A That's right.

Q In fairness to you—and we could hide the ball and say, you just answer these questions and then at the end you find out that someone is being executed what you could see what effect that might have on certain people?

A Uh-huh.

Q All right. I'm going to stop and let you do some talking. It's your opinion that we want to hear. You were asked the question how you feel about the death penalty. They only gave you three lines and you've got almost four lines. There's nothing magic about those three lines. You were given precious little time to think about this. I mean, it's not like you had a week or so to dwell on it.

Would you just tell us in your own words how you feel about the death penalty?

A I think it should be given. The death penalty should be given in certain circumstances. As I said people hurting

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[1945] were held.)

THE COURT: Do you-all want to argue?

MR. CUNNINGHAM: I don't. THE COURT: Let me get on the record, Pam. Mr. Cunningham, I'm going to sustain the State's challenge to Ms. Butler. The court is going to let the record reflect—and I'll let the lawyers challenge me on this. This lady really an interesting juror. I think she was somewhat emotional in appearance from time to time, but I don't have any doubt that—well, she didn't always accept what the lawyers said as gospel or the Judge, for that matter. I think she probably understood what her situation and relationship would be as a juror in this case. After watching her and hearing all of her answers, this Court believes and finds that her views about the death penalty

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[1948] LOUISE CARTER,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Good afternoon. Ms. Carter. As I was introduced to you earlier, my name is Jim Nelson. I'm an assistant district attorney here in Dallas. The gentleman seated next to me is Mr. Paul Macaluso. As I think you were told this morning, there will be one other gentleman involved in this for the State of Texas and his name is Norman Kinne. Mr. Kinne who happens to be about fifty years old, is home again this week with the chicken pox and has been for a couple of weeks. We've given him a little bit of a hard time about that. He will be presenting the evidence for the State of Texas in this case. The three of us are all assistant district attorneys and have been assigned to this case by Henry Wade, the elected district attorney, to handle it for the State of Texas.

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[1998] minutes and you'll be on your way one way or the other.

Ms. Carter, maybe I don't need to send you out. Maybe I can decide this. Ms. Carter, I'm going to excuse you from service in this case. I'm going to sustain the State's challenge. Off the record, Pam.

(Whereupon, there was an off-the-record discussion, after which these proceedings were recessed to Tuesday, February 18, 1986, at which time the following proceedings were held.)

THE COURT: I want to ask you to make yourself as comfortable as possible. Sometimes that is easier said than done. The reason you're up there is because it gives us a chance to hear you and the lawyers to see you better from up here and everything. The only thing I want

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[2050] SHEILA WHITE,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Good morning, Ms. White. I want to start out by reintroducing every one who you met at least briefly yesterday. My name is Jim Nelson. The man seated next to me is Mr. Paul Macaluso. Another man who will be involved in this trial once we start putting on evidence is a gentleman by the name of Norman Kinne. Mr. Kinne, who is about fifty years old or so, has been suffering from the chicken pox and we've been giving him a little bit of trouble about that. When the trial starts, he will be presenting the evidence and taking, what we call, the lead in the case. The three of us, Mr. Macaluso, Mr. Kinne and myself are assistant district attorneys. We've been assigned by Henry Wade to handle this case for the State of Texas.

Seated immediately to my left is

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[2053] that's all we ask of you.

Now, I feel like you have a right to know at this point, Ms. White, what the position of the State of Texas and our office is in this case. We are actively seeking the death penalty in this case for that man right down there, Thomas Joe Miller-El. We feel like we will be able to present to twelve persons on a jury the type and quantity of evidence for them to, first of all, convict him of capital murder and then in the punishment phase, enough evidence for them to answer those three questions there yes. If each of those questions are answered yes by the jury, that results as a matter of law in the death penalty. At that point Judge McDowell has no option whatsoever. If those three questions are answered yes, then Judge McDowell must—is required to assess the death penalty in this case. If one of those questions is answered no, then Judge McDowell is required to assess a life sentence. There is no option. He has no discretion in this matter at all. It's up to the jury and it's the jury's decision.

That's where we are and that's [2054] what we're planning to do. With that—you filled out a questionnaire yesterday and I know you didn't have a whole lot of time to think about it and all this was kind of sprung on you. Most people come down here expecting to be on a civil case or a shoplifting case or something like that and you wind up on a capital murder case. There was one question on here about the death penalty and now that you've had time to think about it a little bit more and, I guess, sleep on it, I'm going to ask you, if you would, to just tell us in your own words how you feel about the death penalty and whether you feel it serves a purpose in our society or not?

A I don't disagree with the law, that there is a death penalty, but for my own self, I cannot in all consciousness, you know, say that someone is guilty and, yes, they should be executed.

Q Okay. Let me—you're the forty—first person we've talked to in one way or another in trying to select this jury. We have two jurors at this point. You can see from that that we've got one in twenty so far that

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[2103] JOAN E. WEINER,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Good morning, Ms. Weiner. Ms. Weiner, let me begin by introducing every one here. I'm Paul Macaluso. This if Jim Nelson.

MR. NELSON: Good morning.

Q Once the trial begins, we will be joined by another assistant district attorney. His name is Norman Kinne. Mr. Kinne is not here primarily because—he may be here today. He's recovering from a bout with the chicken pox. I haven't seen him in over two weeks myself. He's about fifty years old, too. We've been ribbing him a whole lot. We're the lawyers for the State and we're representing the district attorney's office of Dallas County in this particular case. I'm sure you already knew that.

To Jim's immediate left is Mr. E. Brice Cunningham.

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[2107] much as you can.

There are no wrong answers and no right answers and no one is going to grade you obviously when it's all over with. The idea is to just get you to relax and tell us how you feel and how you think. If you're just as straight with us as you can be and we ask the right questions, then you will be doing your job and we'll be doing ours.

Ma'am, you know as well as I do that no one is going to quarrel with you or argue with you or talk you into anything or out of anything. Just tell us what is on your mind about anything. I don't care what it is. By all means, if I'm not making myself clear, let me know. You're not going to hurt my feelings. If you have a question, ask it. If you have something you would like to tell us that wasn't covered by the questionnaire or our discussion, in fairness to both sides, just let us know what it is.

Now, let me tell you, in fairness to both sides, what our position is in this particular case. Ms. Weiner, we are actively seeking the death penalty in this case for **[2108]** Thomas Joe Miller-El. We know that the law allows for the death penalty in a capital murder case and we intend to be able to provide this jury, once it is selected, with the type and the quality of evidence that would convince them beyond any reasonable doubt whatsoever that the Defendant is

guilty just exactly as he's charged in this indictment of capital murder.

Then in the second part of the trial, we intend to provide that same jury with the type and the quality of evidence that would convince them beyond any reasonable doubt whatsoever that the questions—and they're over there and we'll talk about them a little bit later—the Judge would submit at the end of the trial for the jury to answer should be answered yes. As you know, three yes answers equal a mandatory, automatic sentence of death for Thomas Joe Miller-El or anyone else so charged. We just want to put you on notice just as we've told every other juror that we've talked to just to let them know what the stakes are and what we intend to prove based on the evidence. **[2109]** Now, it's up to the jury to decide whether or not we've met that test and that's obviously where you come in as a juror, so we think it only fair to let you know at the outset what our position is.

Now, with those remarks aside—and I've done more than enough talking to this point. We want to hear what you have to say. I know you were asked this question fifty six, "Do you believe in the death penalty?" and they give you a couple of lines there and a few minutes, I guess, to answer it along with some other questions. Would you share with us, all of us here, your personal feelings, if you could, in your own words how you do feel about the death penalty and capital punishment and secondly, do you feel you could serve on this type of a jury and actually render a decision that would result in the death of the Defendant in this case based on the evidence?

A Gosh. I do believe in the death penalty. I could render a verdict that way, but it's a lot easier for me to say at home that beyond a shadow of a doubt, yes, I do. I mean, I do believe in the death penalty. I

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[2132] reasonable doubt. If we don't, you find him not guilty. In the second part of the trial, we have to satisfy you and convince you beyond a reasonable doubt that those three questions should be answered yes, otherwise you have to answer them no.

A Right.

Q You just let the chips fall where they may and let the law take its course and no one is going to quarrel with you.

I have just a few minutes left, Ms. Weiner, and I want to ask you some very important things. I'm not suggesting that this would occur, but let's just imagine for a second: Let's say you're on a hypothetical jury, a capital murder jury. Murder during a burglary, that's a type of capital murder. You know we have to prove murder and burglary if we expect you to find someone guilty of capital murder?

A Right.

Q Let's say you're on this jury and you hear all the testimony and you and the other jurors are convinced that a defendant killed the victim and there's no question about **[2133]** it. It was murder, but you didn't hear any testimony about the burglary or you have a reasonable doubt about that. Do you understand under those circumstances, if that were to happen, you couldn't find that defendant guilty of capital murder, could you?

A No.

Q Because we didn't prove capital murder, did we?

A Right.

Q We just proved murder?

A Right.

Q So you find the Defendant not guilty of capital murder and find him guilty of what we did prove, which was what? Murder.

A Murder.

Q Were that to happen, the law sets out a completely different range of punishment. I think the Judge talked

about that a little bit yesterday. There is no trick to it. The law simply expects, to be a qualified juror on a murder case, regardless of your personal feelings on whether a person should get death, life—do you understand first off in a murder case that a person cannot receive the death **[2134]** penalty?

A Right.

Q The range of penalty is broad as for any offense under the law. I think the reason it is that broad is because the law allows you to take into consideration, you and the other jurors, the infinite number of circumstances under which one person could knowingly, as the law says, or intentionally cause the death of another individual. Now, I want you to bear in mind that we're not talking about a murder where someone acted in self-defense or was crazy or insane or a crime of passion or an accident because those aren't murders. If you believe that, that wouldn't be murder. In other words, you wouldn't set a low penalty because you thought someone acted in self-defense. If you thought someone acted in self-defense, you would find them not guilty?

A Right.

Q Do you see what I'm getting at?

A Uh-huh.

Q We're talking about murder. You know as well as I do—we've both lived long enough to know that one person can kill another **[2135]** person for all different reasons?

A Right.

Q They may not be legal reasons, but they run the gamut, don't they?

A Right.

Q All murders involve the loss of life, but the law says obviously some are worse than others?

A Yes.

Q All the law says is this, and I think you can do this: All the expects [sic] of a juror in a murder case, number one, is to keep an open mind, follow the law and just tell us you

will wait and listen to all of the evidence, wait until all of the facts are in before you make a decision. You're not going to jump to any judgment or anything like that. You haven't heard any facts in a murder case, have you?

A No.

Q No one is going to force you into any particular position, but the law simply says this: To be qualified, you have to say I'll have an open mind and whatever the law is, I'll follow it whether I agree with it or I **[2136]** don't agree with it. The law says you wait until you hear all of the evidence and if you hear a fact situation for murder—and no one is expecting you to think of a particular fact situation, but when you feel it is proper based on the evidence once you hear it that calls for, under the law—you see provided for by law—you can assess the punishment, as the old cliche goes, to fit the crime. In other words, you decide it after you hear the evidence. Do you see what I'm getting at?

A Uh-huh.

Q In other words, if you hear a case—let's imagine you're on a jury. After all the evidence is in, you hear a case, to your way of thinking after you've heard the evidence, calls for, warrants and justifies the minimum, whatever that may be, you will give the minimum?

A Right.

Q On the other hand, if you hear a case of murder that calls for and warrants and justifies and it's the right thing to do to give the maximum, you will give the maximum whatever that is?

[2137] A Yes.

Q Can ~~you do that~~?

A Yes.

Q Even though you may not want to give the minimum or you may not, as you sit there now, be inclined to give the minimum, you don't know, do you?

A No.

Q Why?

A Because you haven't heard the facts yet.

Q That's right. That's all the law expects, to keep an open mind and wait until you hear all the evidence. In other words—you see, the range of penalty for murder is from five years in the Texas Department of Corrections up to ninety-nine years or life and you can even add on an option of a $10,000.00 fine. I gather from what you've said you are the type of person who has an open mind?

A Yes.

Q You have told us that you will follow the law and you will wait, if you're on a murder case and called to make that decision, until you've heard all of the evidence?

[2138] A Yes.

Q If you hear a case, to your way of thinking calls for and warrants and justifies five years, you'll give it?

A Yes.

Q Even though it may be a rare case. Do you see what I'm getting at?

A Yes.

Q The same thing would hold true for the maximum. If you hear a case that calls for and warrants and justifies—you know, the facts call for it—a ninety-nine year or life sentence and a $10,000.00 fine, you will do that because the law and the facts call for it?

A Yes.

Q You understand that it may be difficult and the law presumes that it might be difficult to give the maximum. You're going to have to hear special facts before you would give someone ninety-nine years or life?

A Right.

Q The same thing would hold true for the minimum. You would have to hear special facts to satisfy you that the minimum was deserved, to give five years. If you do hear **[2139]** those facts, you will give five years, won't you?

A Yes.

Q Or anywhere in between?

A Uh-huh.

Q I think I'm out of time, Ms. Weiner.

MR. MACALUSO: Is that correct, Judge?

THE COURT: Yes. You're over time.

Q Let me just ask you one question, Ms. Weiner. I notice that you have some relatives that are in police work?

A Yes.

Q You understand, when the Judge went over this the other day, that you judge all witnesses by the same yardstick. In other words, it doesn't matter whether a witness is a police officer, a psychiatrist or a skid—row bum, you apply the same yardstick in deciding how much or how little you wish to believe. You wouldn't automatically believe a police officer before be gets on the stand because you say police offices always tell the truth. You

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[2158] From what we've heard, it appears that you are qualified—well, as we get what you've seen on TV out of your mine.

A Right.

Q You say your son was ten years old at the time he was arrested?

A Yes.

Q In other words, be was not handled down here. It was out at the juvenile home. Was it at the juvenile home?

A No. It was downtown. We had to pick him up down there. We lived in Richardson, but he was at K-Mart in Dallas so he was taken to the Dallas police station.

Q You indicated that you do believe in the death penalty, but you don't know why. You just do.

A Yes.

Q In other words, some people say that is the maximum and I think that it deters—I think it may prevent other

people or something like that, a million number of reasons. Then there are some people like yourself who say I believe in it and I just don't know why, but I do and I've always felt

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[2242] RONALD P. SALSINI,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Good afternoon, Mr. Salsini. Let me begin by reintroducing every one here. I'm Paul Macaluso and this is Jim Nelson and once the trial begins, we will be joined by Norman Kinne. We are all assistant criminal district attorneys here in Dallas and we're representing the State of Texas in this particular case.

Now, to Jim's immediate left is Mr. Brice Cunningham.

MR. CUNNINGHAM: How are you, Mr. Salsini?

Q To Mr. Cunningham's immediate left is Mr. Royce West.

MR. WEST: Mr. Salsini, how are you doing, sir?

Q As you may recall from the introductions yesterday, they are the defense attorneys who have been appointed by Judge

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[2246] you or anything like that. Just tell us how you feel and you will be doing your job and, if we ask the right questions, we'll be doing our job.

Now, if you have a question, by all means ask it because there is a lot of stuff we're going to be throwing at you and things we're going to be talking about. If I'm not making myself clear at any time, by all means stop me and let me slow down, whatever the case may be. No one is going, like

I said, to talk you into or try to talk you out of a position at all. Just tell us how you feel. If there is something that you need to tell us, whether we cover it or not, by all means, just in fairness to both sides, let us know what it is.

Now, let me tell you what our position is in this case. Just to be fair with you, as we have done with forty-three other jurors that we've talked to, we are actively seeking the death penalty in this particular case for this particular Defendant, Thomas Joe Miller-El. We're not making any bones about it. We know that the law allows for it and we **[2247]** intend to provide the jury, that meaning you if you're on the jury, with the type and the quality of evidence that would convince you beyond any reasonable doubt whatsoever that Mr. Thomas Joe Miller-El is guilty of capital murder just exactly as he's been charged in this indictment and nothing else.

That's done in the first part of the trial. Then we intend to be able to provide the jury in the second part of the trial, where the penalty is actually determined, once again with the type and the quality of evidence that would convince them beyond any reasonable doubt that those three questions should be answered yes. You know the effect of all yes answers is a mandatory sentence of death by lethal injection.

Now, that's just our position. Obviously it depends on the evidence and depends on the decision made by the jury, but I want you to know, like we let the other jurors know, just exactly what we're trying to prove and we intend to prove during the course of this trial and what the law allows under a certain type of evidence.

[2248] Now, with those remarks aside, like I said, you're the one whose opinion is the most valuable here this afternoon. We want to know how you feel. Let me just ask you. I know you were asked this question fifty-six, how you feel about the death penalty, but you only had a few minutes to answer it and a few minutes to think about it. In your own words, why don't you just tell us how you feel about the death penalty generally speaking and your ability to actually serve on this kind of a jury?

A I was thinking about it as we talked about it yesterday and I've been thinking about it since we left there. I believe in the death penalty because it is a good deterrent and everything—the only deterrent for a crime like that. As far as—is it my decision as far as on a jury, I think I could make the decision, but I would really have to think about it long and hard before I could make that decision.

Q Sure. Naturally, given the magnitude of any decision in this type of case, anyone would expect you to consider the

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[2251] see what I'm getting at? That would be one thing. If it would just be a difficult situation, then that wouldn't be a reason. Do you see what I'm getting at?

A Uh-huh.

Q Allowing that anybody serving on this type of case would take it serious—at least I hope they would. I would.

A Right.

Q Are you saying that you just would evaluate the evidence carefully or are you saying that there might be a situation arise where you, in all honesty, feel that the magnitude of the situation is such where your personal feelings about making a mistake or whatever it might be might bother you for the rest of your life?

A I think I could make the decision, you know, come up with it, but I think it would be more of I would be forced into that position. I wouldn't be happy with it, but I could do it. I don't think I would be pleased with it. Even if there was no doubt or anything, I think I might have a problem with it in the future.

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[2270] Q One or more no answers, life?

A Right.

Q Let's shift our thinking for just one second away from automatic life or death and let's talk about a situation that I'm not suggesting will occur in this particular case, sir, but I want to talk to you about it briefly. That's a situation where, once again, you're on a capital murder jury. Somebody is charged with capital murder. Let's say murder during a burglary. That's one type. You're convinced beyond a reasonable doubt that he killed somebody, that it was murder, but you have a reasonable doubt as to whether it occurred during a burglary. You don't hear any testimony about a burglary. We have to prove both if we expect you to find him guilty of capital murder, don't we?

A Yes.

Q We didn't do that, did we?

A Right.

Q So you found him not guilty of capital murder and you found him guilty of what we did prove to you, which is what?

A Murder.

[2271] Q If that happens, if that really happened, murder has a totally different range of penalty. It is no longer mandatory life or death. It is as broad as any punishment under the law, five years to ninety-nine years or life. The legislature has set that range of punishment broad enough so you, as a juror and the eleven other jurors, can encompass—you can tailor a punishment based on the infinite number of circumstances, backgrounds and relationships where one person ends up murdering another person. We all know that all murders are bad, where one person knowingly or intentionally causes the death of another person without any legal excuse or legal justification, but there may be a myriad of nonlegal reasons, mitigation let's say, why one person murders another person.

The law simply says to be qualified as a juror all you have to do is tell us—and I think you can do this, Mr. Salsini—one, that you will follow the law; two, that you will keep an open mind and wait until you've heard all of the evi-

dence so you can make a decision and then you will simply **[2272]** tailor the punishment to fit the crime within the limits of the law. Can you do that?

A Yes.

Q In other words, if you heard a case that you felt—no one is committing you right now. Whether you can think of one or not, it doesn't matter. Just tell us that you are an open-minded individual and you will follow the law and if you do hear a case, after you've heard the evidence, to your way of thinking calls for, warrants, or justifies the minimum—and you know the minimum is five years—you will give five years.

A Right.

Q By the same token, if you hear a case, where the facts and circumstances in a murder case calls for, warrants and justifies the maximum—and you do know what the maximum is, ninety-nine years or life and a $10,000.00 fine—you would give that?

A Yes.

Q The cases may be few and far between that you would give five years or ninety—nine years or life, but you just tell us that you will wait until you hear the evidence **[2273]** and if you feel that it's proper, you will give it after you've heard the evidence, either one or the other or anywhere in between?

A Right.

Q Any problem with that at all?

A No.

Q Two very short things here and then I'll let the other lawyers talk to you. You understand what the Judge said about a conviction on the testimony of one eyewitness? There may, in many instances, like when your home got robbed, be only one eyewitness to that offense or a lady is raped or whatever the case may be. The law says that a conviction can be based on just one eyewitness if you believe

the eyewitness is capable of testifying as to the actual events. Do you see what I'm getting at?

A Yes.

Q The question to you, sir, is, could you base a conviction in a capital murder case or a murder case, for that matter, on the testimony of one eyewitness if you believed the eyewitness beyond a reasonable doubt?

A With no other evidence at all?

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[2345] CHATTA J. NIX,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Good morning, Ms. Nix. I want to reintroduce everybody to start things off. My name is Jim Nelson. The man seated next to me is Paul Macaluso. There is one other lawyer that will be involved in this who isn't here today and his name is Norman Kinne. He will be presenting the evidence for us. Mr. Kinne and Mr. Macaluso and myself are assistant district attorneys here in Dallas. We've been assigned by Henry Wade, the elected district attorney to handle this case for the State of Texas.

Seated immediately to my left is Mr. E. Brice Cunningham.

MR. CUNNINGHAM: Good morning, Ms. Nix.

Q Next to him is Mr. Royce West.

MR. WEST: Mr. Nix, good morning.

[2346] Q These two gentlemen have been appointed by Judge McDowell to handle the defense for Thomas Joe Miller-El. He's the man at the far end of the table. You might be able to see him if you lean forward a little bit there. As you know by now, Mr. Miller-El is charged with the offense of capital murder. He's been indicted by the Dallas County Grand Jury for that offense.

Now, that is the most serious criminal offense any person can be charged with in the State of Texas. I don't recall from looking at your data sheet. Have you served on a jury before, ma'am?

A No, I never have.

Q If you had -- you remember Monday morning, you-all sat out there in a group of about forty of you and we talked to you a little bit at that time. A normal jury selection process most of the voir dire would be done in that kind of situation. We talk to you out there and if we have any questions, we would ask them there in front of the group.

Because we're dealing with capital murder and there are strong feelings on both **[2347]** sides in this type of case, the law allows us to talk to you individually as we're doing this morning. Our hope is that, if you don't have to speak in front of forty or fifty people, you will be able to relax a little more and be a little more open with us and not be concerned about what the other forty or fifty people out there may think about what you have to say and how you're saying it or something.

What I'm getting to is, I want you to relax just as much as you can and remember that there are no right or wrong answers to anything I'm going to ask you or any of these lawyers are going to ask you. We're trying to find out how you feel about some things. We know that there are some strong feelings one way or the other on these issues and, although I'm going to be doing a lot of the talking, I want to know how you feel.

If I confuse you or if I don't make myself clear about something or you have a question, I hope you will stop me and let's get it straightened out so we're understanding each other as we go through this. If you will do that for me and remember that there are no **[2348]** right or wrong answers and answer the questions just as best you can, that would sure help us a great deal.

Now, Ms. Nix, I feel it is only fair to you that we tell you going in what our position is. We, meaning Mr. Kinne, Mr. Macaluso and myself representing the State of Texas, are actively seeking the death penalty for that man right down there, Thomas Joe Miller-El. We feel like we will be able to present to a jury, twelve people, the type and the quantity of evidence which will convince them to find him guilty of capital murder and the type and quality of evidence that will convince them to answer those three questions there on the boards yes.

If each of those questions is answered yes, that results in Judge McDowell assessing the death sentence in this case, no options, no considerations, no going back. That's how it works. We'll talk to you a little more about that as I go on here, but that's our position. We're actively seeking the death penalty and we will continue to do so throughout the trial with the anticipation that **[2349]** those questions will be answered yes, the Judge will sentence this Defendant to death, he will be executed down in Huntsville, Texas.

Now, you had a chance yesterday to fill out a questionnaire -- Monday I guess it was -- and you didn't have a whole lot of time. We were moving you in and out of the courtroom and had you running around a little bit and you didn't have a whole lot of time to think about it. There was one question on there about your feelings about the death penalty. You answered it fairly completely, but you've had a couple of days to sleep on it and think about it some more, I would guess. I'm going to ask you, if you would, just in your own words, to tell us how you feel about the death penalty and whether you feel it serves a purpose in our society?

A Well, I do believe in the death penalty. I wouldn't want to use it just haphazardly or just for the sake -- just because we can or because it is allowable. I believe -- in my own personal mind I make a distinction between what murder is and what the taking of a life can be. I don't know if the **[2350]** law does that or not. A man who is murdered, whose life is taken recklessly, is a bad thing. I don't know the best way to put it. To kill is not necessarily to murder, although

murder is always a killing. I don't believe that the death penalty, given to a man who has committed a violent murder and may do so again and may be hesitant before -- I think to administer the death penalty in that situation is killing and is the taking of a life, but it's not murdering that man. It's a self-defense for society. There is a justification for taking that life.

Q Okay. So you feel that it is justified in that -- well, to paraphrase what you said, society has a right to defend itself?

A Yes.

Q I believe you also noted in your answer that you believe it is a deterrent, also?

A I don't know.I was just thinking about this earlier today. I don't know that right now in our society that it is, but I think, if it is not, it's because it's our own fault for not allowing it to be used maybe a little bit more swiftly and more harshly, if **[2351]** that's the word to use. I could be and I think it should be.

Q Okay. Is this something that -- a belief that you've held for quite a period of time?

A Yeah. I guess for as long as I've really ever asked myself the question.

Q Let me talk to you a little bit more about Texas law and I don't know how familiar you are with it. You've obviously given this a great deal of thought. In the State of Texas, the death penalty is only appropriate in one type of crime, a crime called capital murder. Now, that encompasses three or four different types of offenses.

One type is the killing of a specific type of individual, for example, a police officer or a fireman on duty or a prison guard on duty or something like that. Another type is murder for hire. For example, if I hire Mr. Macaluso to kill my ex-wife or something, he can be prosecuted for capital murder and so could I. The third type is mass murder. You may remember the Ionni's killings a year or two ago. The legislature has decided **[2352]** now that that is appropriate for

capital punishment. The fourth type is the type we're dealing with in this case and it's what we call murder plus. It's not only murder, but it's murder in the course of committing another offense, for example, a murder in the course of a burglary or an arson or, in this case, a robbery or a rape. What that basically means is, Ms. Nix, is that we have to prove, number one, that a person knowingly or intentionally caused the death of another individual. Then we have to go further to prove that it was done in the course of committing or attempting to commit the offense of robbery in this particular case.

Now, those things basically -- you said that the death penalty should not be used haphazardly and no one in here is going to disagree with that. I'll guarantee you. Do those types of crimes generally fit with the type of crimes that you think capital punishment is appropriate?

A Yes.

Q Okay. Now, Ms. Nix, I want to talk to you just a little bit about the **[2353]** procedure we're going to go through in this trial, if you get on the jury. Once the jury has been selected, after that the trial is basically two phases. The first phase is what we call the guilty or innocence phase of the trial. It's at that time that we have to prove to you that this Defendant is guilty of capital murder. It is at that time that we have to prove those two things I told you about; first, that he knowingly or intentionally caused the death of another individual without any legal justification or excuse. That's murder, and then that he did that in the course of committing or attempting to commit robbery. Now, we have to prove that to you beyond a reasonable doubt.

That burden of proof is here on this table with Mr. Kinne and Mr. Macaluso and myself. It never moves over to that table. The defense never has anything that they have to prove. They never have anything that they have to disprove. As a matter of fact, you never have to hear a word out of their mouths through the whole trial, but if we don't prove our case beyond a reasonable doubt, it is your **[2354]** duty to find him not guilty. Are you with me on that?

A Yes.

Q Part and parcel of that is, the Defendant sitting down there never has to testify. He has an absolute right not to testify. If he chooses not to testify, you can't consider that. You can't talk about it, discuss it and you can't even think about it. It can't come up in your deliberations one way or the other and it can't have any effect on your deliberations. Am I making myself clear about that?

A Yes.

Q Okay. If you find the Defendant guilty of capital murder, then we move to the second phase of the trial, what we call the punishment phase. Now, under the old law, up to about thirteen years ago, the jury on a capital murder case would listen to evidence and then they, would go back into the jury room and make a decision, life or death, and write either life or death on the jury form and sign it. About twelve or thirteen years ago, the legislature put a different procedure in there. **[2355]** It said that the jury, instead of just saying life or death, must answer questions based on the evidence and we must prove to you that the answers to those questions should be yes. We must prove that to you beyond a reasonable doubt. Again, the burden of proof is here, Ms. Nix, and it never shifts over there. They don't have to prove to you that the answers to any of those questions should be no. We have to prove to you that the answers should be yes. If we don't or if you have a reasonable doubt about it, you have to answer those questions or any of those questions no, if you have a reasonable doubt. Am I making myself clear?

A Yes, sir.

Q Okay. The three questions I'm talking about are those three there on the boards. If you will, why don't you just take a minute and read those over.

A (Juror complies.) This third one is getting me.

Q The third one, everybody has trouble with that. It's a little bit convoluted. It's typical lawyer wording, I think. Let me emphasize one other thing while **[2356]** I'm thinking

about it. I talked about the fact that we had the burden of proof and we have to prove beyond a reasonable doubt. Well, that's because this Defendant down here is presumed to be innocent at this point. Now, if you were called upon to deliberate his guilt or innocence right now, you would have to find him not guilty because we haven't presented any evidence.

A Right.

Q His presumption of innocence doesn't mean that he isn't guilty, but we have to prove it to you. We did the accusing and we've got to do the proving is an old saying.

Let's look at the questions. I want to emphasize again, Ms. Nix, so I'm sure you understand it, a yes answer to each of those three questions results in the death sentence. You aren't saying death any more, but the effect is the same. If those three questions are answered yes, Judge McDowell has absolutely no discretion -- he cannot say, well, I don't agree with that and give the Defendant a life sentence. He must assess the death sentence if those three are answered yes. **[2357]** By the same token, if any one of them or more than one is answered no, then Judge McDowell must assess a life sentence. Again, he has no discretion and no option. So even though you're not writing life or death, you're having the same effect; would you agree with me on that?

A Yes.

Q Okay. Now, let's look at question number one. "Was the conduct of the Defendant that caused the death of the deceased committed deliberately and with the reasonable expectation that the death of the deceased or another would result?" What basically do you think that's asking, Ms. Nix?

A Did he knowingly commit the crime and knew what the result -- you know, at the end of committing that, that a person would be dead.

Q Okay. It's pretty straight forward. I don't mean to act like there's something in there that's not, that you can't see. It's pretty straight forward. For example, if you were standing there and you saw me pull a gun out and put it to

Mr. Macaluso's **[2358]** head and pull the trigger, it would be pretty clear that I did it deliberately and with the reasonable expectation that he was going to die as. a result. If I took a gun out and tried to shoot him in the foot for some reason and the bullet bounced off the floor and off the wall and the ceiling and came down and hit him in the head, then you're going to have a question whether I expected that his death would result?

A Yes.

Q Would you agree with me that that's the kind of thing that they're looking for?

A Yes.

Q Okay. There aren't going to be any definitions of any of the terms in these questions coming from the Judge in the Court's charge. There won't be any definitions at all. We're going to ask you to put your everyday common sense, common usage, meaning on the words in these questions. Let's look at number two. "Is there a probability that the Defendant would commit criminal acts of violence that would constitute a continuing threat to society." What do you think they're **[2359]** looking for there, Ms. Nix?

A If I believe that there is a chance that someone would commit criminal acts -- were to be on our streets again, that they would definitely be a threat to society, to some other person or more than one person.

Q Would you agree with me that the word probability is probably a fairly key word in that question?

A Yes.

Q What does probability mean to you?

A A likelihood.

Q Okay. And it talks about criminal acts of violence. That doesn't necessarily mean another murder. There are other things like a rape or a robbery, an assault. Would you agree with me that all those are criminal acts of violence?

A Yes.

Q Even if I, for some reason, took a baseball bat and I beat Mr. Macaluso up beside the head with the baseball bat, that would be a criminal act of violence.

Now, you're going to hear the facts of this particular case in the first **[2360]** phase of the trial. Would you agree with me, in most every event you can think about, there are three maybe arbitrary divisions, the time before the event, the time during the actual commission of the event and the time afterwards. Can you see how those three things and what happened during those periods of time might help you in answering question number two? For example, before the event; was this planned or was it a spur of the moment thing; if it was planned, was this Defendant involved in planning it or was he just kind of a bystander; did he help in some way? During the actual commission of the crime what did this individual do; was he a leader; was he giving orders or was he kind of on the outskirts being just a look-out or something; was he running the thing; could he have done something less than what he did that wouldn't have resulted in the death of another individual? Third, afterward; how does this person feel; how does he act; does he feel remorse; is he sorry for what has happened?

MR. WEST: Your Honor, I'm going to object at this point in **[2361]** time for purposes of the record. I would object to improper voir dire. Counsel is commenting on the right of the accused not to testify or produce any witnesses.

THE COURT: Well, I'll overrule that, Mr. West. Go ahead.

MR. WEST: Note my exception.

THE COURT: You will explain, I think, will you not? I mean, you understand, Ms. Nix, the Defendant in this case or in any case has no obligation to bring any evidence to this jury. You must, as a juror, if you're selected in this case, base whatever verdict you reach, whether it be guilt or innocence or punishment, only on the evidence that you heard in the case. I've stopped the time, Mr. Nelson.

For that reason, if a **[2362]** defendant in a case should not testify, I would give the jury a written instruction that they may not consider that for any purpose, may not even discuss his failure to testify among themselves and may not take it into consideration as any evidence of guilt or as punishment. I think I understand what Mr. Nelson is saying and what Mr. West objected. It may go to a different part, but it may sound like the same thing to someone who is not a lawyer. Do you understand the instruction?

MS. NIX: Yes, sir.

Q Okay. Ms. Nix, I may be mistaken, but I thought we covered that a few minutes ago, that the Defendant had a right not to testify and I think he knew he had the right not to testify. Would you agree with me that you could look at whether or not he felt bad about what had happened, whether or not he was sorry or was it just another day at the office kind of thing or what acts was he involved in **[2363]** after the crime? Can you see how looking at those three things would help you in answering questions number two or could be a basis for the answer to question number two?

A Yes, sir.

Q Is there some other type of evidence or something special you would want to hear about to answer question number two?

A It's like you said, all I've got to go on is the evidence that you-all present. That's your job.

Q Okay. Fair enough, and we accept that job. As I think I told you at first, we plan to present what we believe to be sufficient type and quantity of evidence to help you answer those questions yes if you're on this jury. I want to emphasize that, as you just said, you will listen to the evidence and make your decision based on the evidence and we're going to ask you to keep an open mind about answering those questions until you've heard all the evidence.

If the answers to the questions should be yes, you'll answer them yes. If they should be no, you will answer them no. You can **[2364]** do that, I think?

A Yes, sir.

Q Okay. Let's look for just a minute at question number three. "Was the conduct of the Defendant in killing the deceased unreasonable in response to the provocation, if any, by the deceased?" That's a little involved and convoluted. I think basically what it is asking, Ms. Nix, was it a provoked killing or an unprovoked killing. Obviously, if it was an unprovoked killing, you would answer that question yes because his conduct was unreasonable. If it was a provoked killing, you're going to have to look at the facts and make a decision whether his conduct was reasonable or unreasonable. You may get question number three and you may not. It depends on whether it's raised by the facts and by the evidence. If you don't get it, the sentence will be determined by just the first two questions. A yes answer to both of those, again, means the death sentence. A no answer to either one means a life sentence. Those are the only two options in a capital murder, either death or life. **[2365]**

That life sentence is subject to the same rules and regulations and considerations as any other life sentence that is given in the State of Texas. Can you see, Ms. Nix, how each of those questions can be answered either yes or no depending on what the evidence is?

A Yes, sir.

Q We talked about how the old law used to be. I'm not real sure why the legislature started asking questions or put the law that way, but I guess it's a buffer. Lots of times you will hear a case or hear a set of facts and have a gut reaction, a very strong feeling, that something ought to happen because you're mad about it. You're enraged about it or whatever. Could you -- let me start out this way: The law requires you to answer these questions based on the evidence and not based on your emotions, but based on the evidence. Even if you, after you heard all the facts and circumstances, if you were so enraged in your mind that this guy has to

have the death penalty and there's no questions about it, he needs to die, if we failed to prove to you that **[2366]** one of those questions should be answered yes beyond a reasonable doubt, could you answer it no?

A If the evidence isn't there, you can't answer it yes.

Q Okay. Even though you're angry and you're mad and if it was just up to you to put life or death and you would put death, you could answer one of those no if we didn't prove it to you?

A Yes, sir.

Q Okay. Vice versa, the same way, if we proved all three of those to you, that they should be answered yes, even if you didn't feel like he ought to get the death penalty, could you answer each of them yes?

A Yes, sir.

Q Any problem with that at all?

A No.

Q What you're telling us is, you will listen to the evidence and base your verdict on the evidence; is that right?

Yes, sir.

Q That's all we're asking you to do, is keep an open mind and listen to the evidence **[2367]** and if we prove to you that he's guilty of capital murder, we're going to ask you to find him guilty. If we haven't done that, whether he testifies or they put on any evidence or not, if we haven't done that, it's your duty to find him not guilty?

A Right.

Q By the same token, if we prove to you that those questions should be answered yes, we're going to ask you to answer them yes and if we haven't, again even if you haven't heard a peep out of the defense, if we haven't proved those to you, we're going to ask you to answer one or more of them no, whichever ones we haven't proved. Are you with me up to this point?

A Yes, sir.

Q I get to talking kind of fast sometimes and I know I'm throwing a lot of stuff at you. I want to law school for three years and still understand about three-fourths of this, so I just want to be sure we're clear on it.

Now, one other thing that may come up and we don't anticipate it will in this **[2368]** case, but we need to talk about it now. I told you what we have in this case is what we call murder plus. Now, the death penalty is only appropriate in Texas for the offense of capital murder. If we proved to you that a defendant knowingly or intentionally caused the death of another individual without any legal justification or excuse, but we failed to prove to you that it was in the course of committing a robbery or in the course of committing any other offense, then we haven't proved to you capital murder, have we?

A Right.

Q We've just proved murder. Now, in Texas for just murder, there is no death penalty. The range of punishment is anywhere from five years up to ninety-nine years or life and an optional fine of up to $10,000.00. Now, when we talk about murder in Texas, Ms. Nix, you hear in other states, on TV, or whatever, about first, second or third degree murder and that kind of thing. In Texas we have murder and that's the knowing or intentional taking of another human life without any legal justification or excuse. We aren't talking **[2369]** about self-defense because, if self-defense is found in a case, the person is not guilty of murder. It's justified. If it is an accident, the person is not guilty of murder or, if it is reckless, he may be guilty of involuntary manslaughter or something, but again it's not murder. If the person is insane at the time, he's not guilty of murder. If it is a killing in the heat of passion -- for example, I have a -

MR. CUNNINGHAM: Your Honor, we will object to him giving any type of factual situation to indicate an involuntary or voluntary manslaughter.

THE COURT: I'll overrule that. You're describing voluntary manslaughter?

Q I just wanted to describe -- if something happened to my little girl and I was so enraged about what happened and I found the person that did it and they were laughing about it and I went and killed the person, that might be under the heat of passion, what we call the immediate influence of sudden passion arising **[2370]** from an adequate cause. That's not murder. That's voluntary manslaughter. When we talk about murder, we're talking about the knowing or intentional killing of another human being without any of those legal justifications or excuses.

Again, the range of punishment for that, if you find that, is anywhere from five years up to ninety-nine years or life and a fine of up to $10,000.00. Would you agree with me, Ms. Nix, that there is a myriad of circumstances under which one person could kill another person, all kinds of surrounding facts and circumstances could come into that, and the jury would be allowed to consider the surrounding facts and circumstances, not legal defenses, but the surrounding facts and circumstances.

The legislature has made that very wide range of punishment so all those things can be considered. In order for you to be qualified to serve on the jury, you have to be able to tell us that you can consider and assess, in a proper case, the entire range of punishment. You don't even have to be able to **[2371]** sit there right now and think of a situation where you would give life for murder. You don't have to be able to sit there and think of a set of facts and circumstances where you would give five years for the offense of murder. What we have to know from you, Ms. Nix, is if, after you've heard all the facts and circumstances of the case -- you've convicted a person of the offense of murder, the knowingly or intentionally killing of another individual without any legal justification or excuse, after you've heard all of that and you've heard everything you're going to hear on the case, all the facts on the punishment phase, also, if you believed a life sentence is called for by the evidence and warranted by the evidence in your own mind, could you give a life sentence?

A Yes, sir.

Q By the same token down at the other end, again, after you heard all of the facts and circumstances and a person is convicted beyond a reasonable doubt of murder, you've heard everything you're going to hear, if you're convinced in your own mind that a **[2372]** five year sentence is appropriate, could you give it?

A Yes, sir.

Q Okay. All we're asking you to do is keep an open mind as to all the evidence and listen to everything before you make a decision. If after you've heard all the facts and circumstances, they call for five years, you cannot only consider that, but you can give it?

A Yes, sir.

Q If it calls for life, you could do that or anywhere in between, twenty-three and a half years, sixty-seven years or whatever it may be, you will give whatever is justified in that range of punishment?

A Yes, sir.

Q You haven't closed your mind to one end or the other or anything in between; is that right?

A Right.

Q Do you have any problem with that at all?

A No, sir.

Q A couple of other things just to **[2373]** finish up here. There are certain circumstances, I think you understand, where there may only be one witness to a crime. For example, a purse-snatching or a rape. The only two people there might be the person who did it and the victim. The law in the State of Texas allows us to prove a case with only one eyewitness if the jury believes that witness beyond a reasonable doubt as to every element of the offense; in other words, everything in the indictment. Could you listen to one witness, one eyewitness and base a decision on the testimony of one eyewitness?

A If I believed them.

Q Okay. If you don't believe them beyond a reasonable doubt, it's your duty to find the person not guilty because we did the accusing and we've got to do the proving. If you believe a person, one eyewitness, beyond a reasonable doubt, could you convict a defendant based on the testimony of one eyewitness?

A Yes, sir.

Q Okay. Any problem with that at all?

A No.

[2374] Q Now we've talked quite a bit about murder and I mentioned the law in other states. You hear a lot of times on TV or in other states about motive and premeditation in murder. In Texas we don't have to prove to you the motive for a killing. You may hear evidence about it, but you may not and that's not a requirement that we have to prove motive. By the same token, we don't have to prove premeditation for you to convict a person of murder or capital murder. Do you have any problem with that?

A No, sir.

Q Any questions about that?

A No.

Q You obviously are going to hear from witness and you're going to have to base your decision on those witnesses and their testimony. You cannot believe a witness or put extra credibility on a witness just because they're a police officer, for example, or they're a priest or a nurse or whatever it may be. I guess it's kind of like a race, Ms. Nix. Everybody starts out at the same point and as they testify and you hear more about them and **[2375]** you listen to, them, some of them are going to pull ahead and be more believable. Some of them are going to fall back and not be very believable. We need to ask you to start out with all the witnesses at the same point, whether they're police or they're priests or ministers or nurses or doctors or lawyers, whatever it may be, can you start each witness out at the same point and listen to them before making a decision whether to believe what they have to say or not?

A I think I can.

Q In other words, you can't believe someone just because they're a police officer?

A Right.

Q Or-just because they're a minister, you have to listen to what they have to say?

A Yes.

Q Any problem with that?

A No.

Q One last thing; the Grand Jury has returned an indictment in this case alleging capital murder. That indictment is absolutely no evidence of this Defendant's guilt. He is **[2376]** presumed innocent and we have to prove that he's guilty beyond a reasonable doubt and that burden of proof, again, stays right here.

I've done a lot of talking and I haven't given you a chance to say very much. Do you have any questions or anything that we haven't talked about that you feel like we need to talk about?

A No, sir.

Q Okay. Do you feel like I've made myself clear about what we've been talking about?

A Yes.

Q I can't think of anything else we need to talk about. I appreciate very much your patience and your time. I thank you for being open with us and answering the questions. I'm not going to bother you any more. These lawyers over here, I'm sure, will have some questions for you, but again thank you very much.

MR. NELSON: Your Honor, we'll pass the prospective juror.

[2377] EXAMINATION

BY MR. WEST:

Q Ms. Nix, my name is Royce West. Let me ask you this: Do you know any of the participants in this particular trial or know of any of us?

A No, sir.

Q You've never seen any of us before?

A No.

Q Now, again, I'm not arguing with you or anything like that. I want to get to know as much about you as possible within the time that I have in order to adequately represent my client. Okay?

A Okay.

Q All right. Now, I notice that it is Chatta JoAnna Charisse?

A Yes, sir.

Q And your husband's name is Gary C. Jones?

A Yes, sir.

Q Why the difference in names, last names?

A It was just a personal decision.

* * * *

[2379] A Right.

Q What is that?

A It's a general contract construction company.

Q Are you Nix?

A My brother is.

Q Speaking of your brother, you indicated on your data sheet that he was on trial in the I-30?

A They messed up on the indictment and reindicted him yesterday instead of the trial and he made a plea bargain so it's not going to trial.

Is that going to affect you in any manner in this particular case?

A Not that I—

Q I mean, are you going to be concentrating on that?

A No, sir.

Q Are you going to be a potential witness in that case?

A No, sir. It's over for him as far as I know.

Q Were you going to be?

A No, sir.

[2380] Q Have you been interviewed by the U.S. Attorney's office?

A No, sir.

Q Have your brother's attorneys or anything like that?

A No, sir. His attorney—I've also been charged with a conspiracy case on another thing and his attorney is my attorney so I have met him and talked to him and I know him.

Q So you have been indicted?

A I haven't been indicted. I've been—a lawsuit has been filed.

Q Is it criminal or civil?

A It's civil, I'm pretty sure.

Q Who filed it?

A I don't even know. Oh, I do, too, FSLIC filed it against me and thousands of others.

Q Who is your attorney?

A Vincent Perini.

Q Does that grow out of the I-30?

A Yes, sir.

Q And Vincent Perini is also your brother's attorney?

* * * *

[2399] MR. NELSON: Your Honor, the State would be pleased to accept Ms. Nix as a juror in this case.

MR. WEST: Your Honor, we would exercise a strike.

THE COURT: Thank you, Mr. West. Ms. Nix, you will be excused from service in this case. Off the record, Pam.

(Whereupon, there was an off-the-record discussion, after which the following proceedings were held.)

MR. NELSON: Judge, the State would like to put into the record for record purposes that juror number fifty, Vergie Miller, has been excused by agreement and she is, in fact, a black female that has been excused by agreement.

MR. CUNNINGHAM: In response to that, Your Honor, our objections with respect to blacks that have been struck have been

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[2401] Counsel and Mr. Miller-El, I have an agreement between Counsel and the Defendant to excuse jurors Burnett and Sustaita by agreement. I will note those and I'm still, of course, willing to approve those.

MR. CUNNINGHAM: Judge, you should also have one on -- you said Burnett and -

THE COURT: Burnett and Sustaita.

MR. CUNNINGHAM: Also, you should have one on Miller and Mullen.

MR. NELSON: You got those earlier today. I don't know if they've ever been put on the record.

THE COURT: I've got those. The other thing I wanted to get on the record that Counsel has inquired of, actually juror number one, who was number eight on the panel, Ms. Sumrow -- you know, we **[2402]** had a hearing on her condition. The Court has decided to exercise its discretion to excuse her without stating any particular reasons. Of course, I have concern for the jeopardy of this case in the event something should occur to her physically. I would not want this case to be in the position where it could not be completed. Even if we had alternate jurors, I still think that's a problem as well as her own personal needs and the fact that I'm not sure how much attention she could give to this Defendant's

case in view of worrying about her physical condition, so she has been excused. That means we have three sworn jurors.

MR. CUNNINGHAM: On behalf of the Defendant, Thomas Joe Miller-El, we would want the Court to know that we object to the

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[2408] MARY J. WITT,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Good morning, Ms. Witt. How are you doing this morning?

A Fine.

Q Let me begin by reintroducing every one here or most everybody. You may recall that I'm Paul Macaluso and this is Jim Nelson and once the trial itself begins, we'll be joined by another assistant district attorney who is not here now, but his name is Norman Kinne. We are assistant criminal district attorneys here in Dallas and our boss is Henry Wade and is [sic] has designated us to represent the State of Texas in this particular case.

Now, to Jim's immediate left is Mr. Brice Cunningham.

MR. CUNNINGHAM: How are you this morning, Ms. Witt?

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[2412] talking about and there are no right answers, either, unless you say that a right answer would simply be what is honestly on your mind and how you honestly feel. If we ask the right questions and you're open and honest with us, as I'm sure you will be, then you will be doing your job and so will we.

Now, let me explain that no one is going to argue with you or quarrel with you or play lawyer with you and try to talk you into or out of anything. Whatever is on your mind, just let us know, all right. If you have a question, don't hesitate to ask that question. If you have something that you would like to tell us that we don't touch on and you feel that it is important or that we might think it is important, then by all means let us know.

Now, let me tell you where we stand on this case, the State of Texas, Mr. Kinne, Mr. Nelson and myself. We are actively seeking the death penalty in this case for Thomas Joe Miller-El. We make no bones about it, Ms. Witt. We know that the law allows for the death penalty in this type of a case and we intend to be able to provide this jury, once it [2413] is selected, with the type and the quality of evidence that will convince the jury, all twelve of them, beyond any reasonable doubt that Mr. Thomas Joe Miller-El is guilty of capital murder just exactly as he is charged in this indictment. That's done in the first part of a criminal trial, as you may know.

The second part of the trial where the penalty or punishment is determined, we once again intend to be able to provide the jury with both the type and the quality of evidence that we feel will convince the jury beyond any reasonable doubt that these questions, all of them, should be answered yes which, as you may recall from the remarks of the Judge the other day, results in a mandatory sentence of death for the Defendant. Now, that's our position. Ultimately, of course, it's the position and the decisions made by the jury that controls, but we feel it only fair that we tell you, along with the other fifty or so others that we've talked to, exactly where we stand at the outset of the trial.

Now, with those remarks and those things out of the way, Ms. Witt, like I said [2414] earlier, you're the most important person here this morning and your opinions are the most important. Let me just ask you—although we know you've answered or were given an opportunity to talk about certain things on the questionnaire, now that you've had

three or four days to sleep on it and think about it, let me just ask you if you would share with all of us here your personal feelings on the death penalty and your ability to serve and actually make a decision in a case of this type as a juror?

A I believe in the death penalty depending on the circumstances, of course. But if it's just a love quarrel or somebody has a momentary insanity, then I may not vote for it at that time, It would depend on the circumstances.

Q What you said is consistent with what the law is and we'll talk about it more a little bit later as it concerns a capital murder. You said it depends on the facts and it depends on the circumstances. None of which you've heard to this point; is that correct?

A Correct.

* * * *

[2435] the dynamics, all of the details of an offense? Do you feel you could learn enough about an individual when you learn all the roles that he played in it, a crime of this magnitude, that could tell you beyond a reasonable doubt, yeah, this is the type of person who probably would commit some criminal act of violence in the future? Do you think you could do that?

A Yes.

Q The third question that you see there is a question that you may receive or you may not receive. It depends on the type of evidence. It's conditional. Basically what that asks you to decide is, was this a provoked killing or an unprovoked killing and you would answer it accordingly. Now, let's shift gears here just for a second. I've got precious little time and I've got a couple of important things—other important things. Let me put it that way. I talked to you earlier about the distinction between murder and capital murder. I'm not suggesting that this would ever occur, Ms. Witt, but we have to allow for the possibility and just discuss it with you now.

[2436] Once again suppose that you're on a jury. It's a capital murder that we've alleged in that indictment, a murder during a burglary. That's a type of capital murder. You, along with the other jurors at the conclusion of the trial, are convinced beyond any reasonable doubt that the Defendant committed the murder. You didn't have any doubt about it at all, but you didn't hear any testimony about a burglary or you have a reasonable doubt about it. Do you understand in a situation like that, the State had not met its burden of proof for a capital murder. We didn't prove both components, did we? We proved the murder, but we didn't prove the other component which makes it a capital murder, and that was the burglary. The law is very clear what you have to do then. You have to find the Defendant not guilty of capital murder and find him guilty instead of what we did prove, which was what?

A Murder.

Q Right. If that happens or were to happen, in any case, you just forget about mandatory life or death because those aren't **[2437]** options for murder, as we discussed earlier. The range of penalty for murder is as broad as it is for any offense under the law. I like to think and the other lawyers agree that it's as broad as it is because the law does take into account and allows a juror properly to take into account, in deciding what the penalty ought to be for a murder, the infinite number and variety of circumstances under which one person can knowingly or intentionally cause the death of another that would be legally murder. Do you see what I'm getting at?

A Yes.

Q Now, all the law expects of you to be qualified as a juror on a murder case is really pretty simple. Number one, it is to follow the law in that range of penalty that we'll talk about in just a minute and, most importantly, to keep an open mind, In other words, if you can tell us that, even though you have not heard any evidence in a murder case, you will follow the law with regard to the range of penalty whatever it is. Then once you've heard all the evidence in

the murder case, I mean all of the background, all of the **[2438]** relationships between the parties, the victim and the Defendant, and so forth and so on, then and only then, after keeping an open mind until you've heard all of the evidence, you'll make up your mind on the facts and not before, not prejudge anything, Can you do that?

A Yes.

Q In other words, if you heard a murder case—and no one is going to argue. Murder is bad. Some are worse. If you heard a murder case, after hearing all the facts of the case, that you feel the minimum is called for, warranted and justified—in other words, if the right thing to do is to give the minimum under these facts, after you hear them, you'll give the minimum whatever it is. Can you do that?

A Yes.

Q If you hear a fact situation, on the other hand, that calls for the maximum and you think, under those facts, that the right thing to do, the justified thing, and the proper thing to do after you've heard the evidence, is to give the maximum, you'll give that? Can you do that?

[2439] A Yes.

Q Allowing that the range of penalty for murder is as low as five years in the Texas Department of Corrections all the way on up to ninety-nine years or life and an optional $10,000.00 fine, could you, if the facts and circumstances warranted it in the proper case, consider and actually vote for a sentence of five years for murder, if you thought it was proper?

A Yes.

Q On the other hand, if you thought the case deserved ninety-nine years or life, you could give that as well, and a $10,000.00 fine or anywhere in between?

A Yes.

Q Now, a couple of quick matters here. Remember what the Judge said? Motive and premeditation—he may have said this on Monday and he may have not. Motive and

premeditation are not two requirements of the State in either a murder or a capital murder case. In other words, we don't have to prove, because we may not be able to prove, what motivates one person to kill another or if

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[2471] The lawyers, both sides, thought you looked pretty good, but there are considerations here that I'm satisfied that the case is moving along well enough to allow them to do this.

Off the record, Pam.

(Whereupon, an off-the-record discussion was held.)

THE COURT: It has been agreed that Ms. Salapong and Mr. Doiron will also be excused; is that correct?

MR. MACALUSO: Yes, sir.

MR. CUNNINGHAM: Yes, Your Honor.

(Whereupon, this cause was recessed to Monday, February 24, 1986, at which time the following proceedings were held.)

THE COURT: I would like the record to reflect that we had forty jurors seated according to the order they came up in. The **[2472]** State declined to shuffle and, over their objection, I told the defense they could have a shuffle and that would be the final shuffle. I believe a shuffle was conducted in the Court's office in box and I believe that both defense counsels and one of the prosecutors had an opportunity to shuffle or reorganize, or whatever you want to call it, the jury cards from downstairs and the final order was arrived at. I handed that to the bailiff who is prepared to recall that order. Is that a fair statement of what went on, Mr. Cunningham?

MR. CUNNINGHAM: That's correct.

MR. WEST: That is a true statement.

THE COURT: My clerk was present in my office when all that occurred, although she didn't do anything more than must observe. **[2473]** The list is going to be reseated now

and that will be the final jury list. I believe the State objects not to having another shuffle?

MR. NELSON: Judge, it is the State's position that the law gives each side the right to shuffle and the Court cannot require the State to waive that right prior to the defense exercising their right, necessarily. Based upon that, we'll object to—although we don't know at this point that we would want a shuffle or not, not being given the opportunity—

THE COURT: Good enough.

MR. WEST: Is the record clear that the Court asked the State whether it did want a shuffle and the State indicated that it did not want a shuffle?

THE COURT: The way I've been operating is, to give the **[2474]** State the first opportunity to shuffle and if they accept or object, that's it.

MR. CUNNINGHAM: That's the way it is presented, if the State goes first, then the Defendant and then the State.

(Whereupon, the jury panel was seated in the courtroom and the following proceedings were held.)

THE COURT: Good morning again, ladies and gentlemen. I appreciate your patience with us. The first thing I would like to do—let's see. Sir, on the last row, what is your name?

PANEL MEMBER: Brian Hagler.

THE COURT: What I'm going to do, Mr. Hagler for starters, I'm going to call off the names of some jurors that I'm going to excuse from service in this case. It will be the last row there. You-all may return to the central

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[2518] LETA GIRARD,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Good afternoon Ms. Girard. As you may remember from this morning, my name is Jim Nelson. I'm an assistant district attorney here in Dallas. The lawyer sitting next to me will be back in just a moment. His name is Paul Macaluso and the third gentlemen who will be joining us at the time we actually start evidence in this trial is Mr. Norman Kinne. The three of us are assistant district attorneys here in Dallas. We've been assigned by Henry Wade, your elected district attorney, to handle this case for the State of Texas.

Mr. E. Brice Cunningham is the gentleman immediately to my left.

MR CUNNINGHAM: How are you, Ms. Girard?

MS. GIRARD: Just fine.

Q And Royce West is next to him.

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[2520] feelings by not being concerned by what thirty-nine or forty people are thinking about what you're talking about. I know it's difficult with you up here on the witness stand and us out here, but I'd like you to try to relax as much as you can.

Understand that there are no right or wrong answers to anything I'm going to ask you or anyone else is going to ask you. We're just trying to find out how you feel about things. If you will just be as honest and as open as you can—I'll have to ask you some questions that are maybe rather pointed at times and I'm not trying to make you uncomfortable because that's the last thing I want. I'm [sic] don't want to even try to argue with you, but I am going to try to find out bow you feel about some things.

With that introduction, let me just basically tell you what our position is. When I say "we," I mean the three of us representing the State of Texas. We are actively seeking

the death penalty for Thomas Joe Miller-El. We feel like we will be able to present to the jurors in this case sufficient **[2521]** type and quantity of evidence to have them convict Thomas Joe Miller-El of the offense of capital murder and also the type and quantity of evidence that will allow a jury to answer those three questions yes, be convinced that those should be answered yes beyond a reasonable doubt. If those three questions are answered yes, Thomas Joe Miller-El receives the death penalty and we anticipate that, if he receives that death penalty, he will be executed at some point.

Now, I tell you that because I feel like it is only fair that you know where we are and what our position is in this thing, but ultimately our position doesn't make that much difference. What counts is the position of you and the other jurors in this case. You filled out that questionnaire this morning. Most people that come down here, if they think about it at all, think maybe I'll be on a civil case or I'll be on a little theft case or something like that and you walk in and sit down and the Judge says this is a capital murder and I guess it would be a little bit of a shock. We asked you to fill these **[2522]** questionnaires out on pretty short notice. There is one question on there about the death penalty. I notice from looking at yours, you didn't answer it. You've had at least a little bit of time to think about it over lunch. Can I just ask you to tell us in your own words how you feel about the death penalty and whether you feel like you could serve on a jury in this type of case?

A Well, I'm really not sure how I feel about the death penalty. The way I feel sometimes is—

MR. CUNNINGHAM: Your Honor, we can't hear.

A To me, living sometimes is a worse—is worse to me than dying would be, so I'm not sure. I'm not saying I couldn't do it, but that's how I feel, I'm just not real sure.

Q Do you feel like the death penalty serves a purpose in our society?

A I'm sure it does.

Q Evidently, from your answers, you've not given this a whole lot of thought before; is that right?

A No.

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[2580] CLARA A. EVANS,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

BY MR. MACALUSO:

Q Good afternoon, Ms. Evans. Can you hear me all right?

A Yes.

Q I'll try and keep my voice up and not talk too fast, but if I don't, if I start going too fast, just slow me down, all right?

A Okay.

Q Let me reintroduce myself. I'm Paul Macaluso. This is Jim Nelson and we will be joined by another lawyer. His name is Norman Kinne. We're all assistant district attorneys and we work for Henry Wade. I'm sure you know that he's the district attorney here in Dallas. We're the lawyers representing the State of Texas in this case.

Now, to Jim's immediate left is Mr. Brice Cunningham.

MR. CUNNINGHAM: How are

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[2584] A That may be difficult. This is an issue I have avoided, the capital punishment issue.

Q We're going to talk about it in just a little bit here and just tell us how you feel. I've read [sic] your questionnaire and I know how you feel. I've got some idea of how you feel. I know you feel very strongly about that. That's not unusual.

You are juror number fifty-nine. We've talked to many, many people in selecting this jury or trying to select it. We only have three jurors at this time that are qualified. I think you can see that the predominant reason why we only have three jurors out of the significant number that we've talked to is because of the strong feeling that people have one way or the other about the death penalty. That's why the law gives us this added time and this kind of semi-private atmosphere to talk to you about it. We want to know just how you fee.

Now, let me tell you what our position is just in fairness to you, okay?

A Okay.

[2585] Q Now, this is the same thing we've told each and every other juror that we've talked to. Ms. Evans, the State of Texas, the lawyers over here, are actively seeking the death penalty for Thomas Joe Miller-El. We intend to do that throughout the trial. By that I mean, we intend to be able to provide a jury, once it is selected, with the type of evidence and the quality of evidence that will convince them beyond a reasonable doubt that Thomas Joe Miller-El is guilty of the offense of capital murder just exactly as he is charged in this indictment beyond any reasonable doubt. That's done in the first part of the trial, the decision as to guilt or innocence.

Then in the second part of the trial where the issue of penalty is actually determined by the jury, we once again intend to be able to provide the jury with the type and the quality of evidence that will convince them beyond any reasonable doubt that those three questions should be answered yes which, as you know, results automatically in this Defendant be taking [sic] down to Huntsville, Texas at some point in time, taken down to death row, **[2586]** at sometime designated by the law he will be taken to the death house. They will put him on a gurney bed and take him to the death house and put an IV in his arm and inject him with a lethal substance that will cause his death.

Now, Ms. Evans, I'm not saying that to scare you and I'm not saying that to sound morose. I'm just telling you that in fairness as I've told and the other lawyers have told every juror we've talked to just to bring home the reality of the situation that is at hand here. You know, if you stop to think about it, it's really only being fair to you and all the other jurors. I'm sure this is not something you've been reading about. This is not something you may be talking about philosophically over a cup of coffee or with friends or whatever the case may be. It's not something you've been reading about in the paper or seen on TV. No one wants to put anybody—first of all, no one wants anybody here as a prospective juror such as yourself to be put in a position of compromising any conscientious, religious or moral, strong-felt feelings that you have. Do you see what I'm **[2587]** getting at?

A Uh-huh.

Q All right. That's why we have this opportunity to talk to you as we're doing now. We just want you to know—you know, we know that the law does allow for capital punishment in Texas. Of course, if the jury finds that the evidence proves it beyond a reasonable doubt, then the questions are answered yes. Do you see what I'm getting at? Three yes answers, that's automatically death. Judge McDowell has absolutely no power under the law or otherwise, so far as I know, to override the jury's verdict. Just the same as if one or more of the questions are answered no, that equals a mandatory life sentence. Do you see what I'm getting at?

A Uh-huh.

Q All right. But whether the Judge agrees or disagrees with the jury's verdict, you know, it really doesn't matter because the law does not allow him to override or to replace your verdict as a juror with his own feelings one way or the other.

I notice here in question fifty-**[2588]** six, Ms. Evans—and I'm going to let you do some talking now because the lawyers have heard enough of me. I can guarantee you that.

You obviously are opposed to the death penalty and capital punishment?

A Basically, yes.

Q Let me just ask you if you would share with us in your own words—just tell us how you feel in your own words about the death penalty and capital punishment and then your ability or inability to actually serve on a jury of this type and render a decision that you know would result—in other words, three yes answers would result in the execution of Thomas Joe Miller-El right now there. Just tell us how you feel about that and your ability to actually serve on a jury of this type.

A Well, I think that probably the serving on the jury wouldn't be as difficult as the type of sentence would be. I feel I'm a fairly objective person. I feel I can balance and weigh evidence without emotion, but I do value life. I think probably the only time that I would myself be able to live comfortably **[2589]** after a death penalty that I was responsible for or partially responsible for would be if the prisoner themselves wanted it.

Q Well, that's a situation, I think, in all — being totally realistic about it, it's not going to happen in this case.

A I would assume so, too.

Q Certainly we cannot rely on that.

A Right.

Q I don't think it would be unfair to either side or duly harm or prejudice either side to assume that would not be —

A I would agree.

Q — under any stretch of the imagination the situation or a consideration. Eliminating that one possibility you mentioned, do you feel you could not in good conscience serve on a jury of this type and render a decision of this nature?

A Well, you see I have a question there, too. If everybody on the jury is selected on the basis that they

would impose the death penalty — in other words, there just really isn't too much in the way of an option then, is there? In other words, we don't have

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[2651] JERRY W. MOSLEY,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Good morning, Mr. Mosley.

A Good morning.

Q I want to start out by reintroducing everybody that's here. Again, my name is Jim Nelson. The gentleman sitting next to me is Mr. Paul Macaluso. As I think you were told yesterday morning, a third lawyer will be involved with us for the State. His name is Norman Kinne. He's not here at the moment. The three of us are all assistant district attorneys here in Dallas. We've been assigned by Henry Wade, our elected district attorney, to handle this case for the State of Texas.

The man immediately to my left is Mr. E. Brice Cunningham.

MR. CUNNINGHAM: Good morning, Mr. Mosley.

* * * *

[2654] as open with us as you can. I may seem like I'm trying to pin you down on some things and I'm going to have to because the law requires me to and I'm not doing that to be rude or give you trouble or make things difficult, but I hope you'll bear with me because I'm doing what the law requires that I do.

With that kind of introduction, let me just tell you what our position is on this case. The State of Texas and those of

us representing the State of Texas are actively seeking the death penalty for Thomas Joe Miller-El in this case. We feel we will be able to present to a jury the type and quality of evidence to, number one, convince them that he's guilty of the offense of capital murder and, secondly, convince twelve jurors to answer those three questions right there on the boards yes. Mr. Mosley, if those three questions are answered yes, Judge McDowell has no option but to sentence Thomas Joe Miller-El to death. He has no option but to sentence him to die by lethal injection down in Huntsville, Texas. Even if he disagrees with what the jury does, if he doesn't personally feel the death penalty **[2655]** ought to be enforced or ought to be given in this case, if the jury answers those three questions yes, that's it. Thomas Joe Miller-El will be put to death at the time designated by law as a result of that verdict. That's what we are planning to do and that's what we anticipate we will be able to do and we anticipate at some point, the life of Thomas Joe Miller-El, that man right down there, will be taken by the State of Texas as a result of this verdict.

Now, you filled out a questionnaire yesterday and I've basically told you our position, but we need to know are your feelings. One of the questions on the questionnaire yesterday, number fifty-six I think it is, asks you what you think about the death penalty, how you feel about it and whether you have feelings for or against it. You answered that question yesterday and were fairly complete in answering it, but I'm going to ask you, since you've had a night to sleep on it—and I would guess, if I were in your position, I would have done quite a bit more thinking about what I was in for in this kind **[2656]** of thing. Would you just tell us in your own words how you feel about the death penalty, number one, and, secondly, about your ability to serve on a jury in this type of case?

A Well, I oppose the death penalty actually myself. I think by taking a man's life for whatever reason, that's not right. I'm not saying that he shouldn't be punished, but that's a big step, you know, to take someone's life.

Q Maybe other punishments would be more appropriate than the death penalty?

A I would say so. I'm not against not punishing a man at all for what he's done, but, you know, taking a man's life, you know, with the facts that we have, you—all have or whatever, we, meaning myself—I don't know whether this man is [sic] actually did it. I don't know what the circumstances were when he done it. I don't know whether it was a case of self-defense. I don't know whether it was just actually, you know, just outright murder or whatever, so it's hard to determine the future or try to determine the future of a person until you get the facts to know what brought

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[2675] to try to stay around and go naturally, you know. I hope everybody else has the same idea in mind, but, you know, as far as just—if that man is executed there, you know, and you knowing that you was one of the twelve that actually had a hand in it, you know, obviously it's going to make you feel something.

Q Right. Right. Well, let me just try to kind of summarize what we've talked about, Mr. Mosley, and you correct me if I say anything wrong or say anything that you don't agree with. Let me ask you one other question. Have you felt this way about the death penalty for quite a long time?

A Yeah, ever since they first passed the deal, the law, whatever it was. You know, I just don't feel like it's just right from the beginning for anybody else to judge a man—take his life and call it legal.

Q Okay. Under any circumstances?

A Under any circumstances.

Q So you've felt this way for a long time and you feel that the death penalty is just not right and you can't have a hand in assessing in executing somebody?

[2676] A That's right.

Q Mr. Mosley, the last thing I want to do and the last thing anybody here should try to do is argue with you and change your mind. I'm not going to try to do that. I guess from what you've told me, even if I tried to, I couldn't. I mean, I could stand here and play lawyer with you and argue with you and switch things all around, but I'm not going to change your feelings about this, am I?

A No.

Q Okay. Those feelings that you've held for a long time, you're not going to change them today; is that right?

A That's right.

Q Well, Mr. Mosley, from what you're saying am I correct that you would refuse to take the oath to serve on his jury then knowing what your job would be; is that right?

A That's right. If I'm going to take the oath as far as the death penalty is concerned, yeah.

Q You understand, by taking that oath, you're saying that if the facts and circumstances justify it, I'll give the death **[2677]** penalty?

A If that's what the oath is about, well then, like I say, I would justly fear that taking the oath is not helping my conscience and it's not helping him.

Q That's fine. There's nothing illegal about not talking that oath. The law says that it is your option as a juror whether you take that oath or not. There's nothing illegal about not taking it. You have told me that you would refuse to take it and I believe you, Mr. Mosley. I'm not going to bother you any more. I'm not going to talk with you any more. I don't see any point in it. You've been very clear in expressing your feelings to me and I appreciate that. I appreciate your talking with me and being patient with me as we've gone through all this stuff. I appreciate your time very much. These lawyers will probably have some questions for you. They won't argue with you or try to change your mind, either.

MR. NELSON: Your Honor, we'll pass the juror and will submit the juror.

* * * *

[2738] THE COURT: I understand that. You don't have to change your feelings, but could you still answer those questions knowing what would happen to this man over here?

MR. MOSLEY: I would still have my feelings. I can't live with that.

THE COURT: But could you answer the questions if that's what the law and the evidence told you—

MR. MOSLEY: Yes. To go along with the law, I would do everything I possibly could to—but I wouldn't feel right knowing that I—

THE COURT: What you're saying is this: Regardless of how you feel, you would still base your verdict on what the evidence was and what the law was. That wouldn't change how you feel about the whole thing, but you **[2739]** would do your duty; is that what you're saying?

MR. MOSLEY: Say that again.

THE COURT: Are you saying that regardless of how you feel about it, you would do your duty and it wouldn't change how you feel, but you would do what the law and the evidence told you you had to do?

MR. MOSLEY: Right. I do what the law and the evi ence tells me to do, but it's just hard to change my feelings.

THE COURT: Well, no one is asking you to change your feelings.

MR. MOSLEY: That is what I'm saying. I'm not saying nobody is asking me to do it, but I'm just answering you.

THE COURT: Going back to square one, what I brought you back in here for, you could take that oath to start out with—

[2740] MR. CUNNINGHAM: Your Honor, could you ask Mr. Mosley to step outside?

THE COURT: Let me ask you to go out in the hall for a second while we argue some more law? We're going to get this law question resolved.

(Whereupon, Mr. Mosley left the courtroom, after which the following proceedings were held.)

THE COURT: I'm ready to rule. Have you-all got something?

MR. CUNNINGHAM: Sixty-one for sixty-four.

THE COURT: When is sixty-four coming in?

MR. CUNNINGHAM: A probation officer. I think the Court will agree that's probably—

THE COURT: Yes. Try to get a hold of Ms. Goeters and head her off. Have Mr. Mosley come back in, please.

[2741] (Whereupon, Mr. Mosley returned to the courtroom and the following proceedings were held.)

THE COURT: Mr. Mosley, we're going to excuse you from service in this case which means you won't be required to serve on this jury. We appreciate your patience with us this morning and your answers. I think I understood what you were saying very well. I don't think anybody here doubts how you feel, so you have my thanks.

First of all, I apologize, Ms. Williams, for being so late and so long in getting you in. Sometimes it goes very slowly. One of our other jurors took quite a bit of time to talk to. I would like to ask you, as much as possible, to make yourself comfortable and relax. As I said, I've got a

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[2743] DORIS J. WILLIAMS,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Good morning, Ms. Williams. Let me begin simply by reintroducing everyone here. My name is Paul Macaluso. To my immediate left is Mr. Jim Nelson. Another lawyer who will be joining the State here is Norman Kinne. He's not here, of course, at the moment. The three of us are assistant district attorneys here in Dallas and we work for Henry Wade. We've been designated as the lawyers who will represent the State of Texas in this case.

Now, to Jim's immediate left is Mr. Brice Cunningham.

MR. CUNNINGHAM: Good morning, Ms. Williams.

Q I imagine directly, either this morning or when we resume after lunch, he will be joined by Royce West. They are the defense attorneys who were appointed by the Court to

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[2746] talking about and no right answers, either, except true answers. If we ask the right questions and you're as open with us as you can possibly be, we'll be doing our job and so will you. Okay?

Ma'am, if you have a question about anything, by all means ask it. Don't be bashful. If there is something that you need to tell us, whether we get near what it is or whatever, just tell us. It doesn't really matter. You know that no one is going to argue with you or quarrel with you about any personal feelings you have about anything. The whole idea is for all of us to get a grip on how you feel about some of the things that will come into play if you're a juror on this case.

That's simply what we're about here. We're trying to find twelve people to sit over here and to act as jurors in this case. We're looking for the twelve people that we feel would be the most fair and the most impartial and the best suited and qualified to serve on this type of case. That's why we're going through all of this.

Now, let me tell you what our **[2747]** position is in this particular case. Ms. Williams, the State of Texas is actively seeking the death penalty. That is, we are actively seeking

the death penalty in this case for Mr. Thomas Joe Miller-El. We know that the law allows for it. We intend to be able to provide a jury, once it is actually selected, with the type as well as the quality of evidence that would convince them in the first phase of the trial that the Defendant is guilty of capital murder exactly as he is charged in this indictment. I've got a copy right here.

Then in the second phase of the trial, once again, to provide the jury with the type and quality of evidence that would convince them beyond any reasonable doubt that all three questions or all the questions that determine life or death should be answered yes which, as you know, results in an automatic sentence of death. Do you see what I'm getting at?

A Yes.

Q The reason I'm telling you that is just to be fair to you as we've been to all the other jurors that we've talked to, to more or **[2748]** less put them on notice or let them know just exactly what our position is or will be based on the evidence. Everyone has a position, but it's really the position of the jury ultimately that will control and make the decision as to life or as to death. Okay?

A Yes.

Q Now, you were given precious little time yesterday to fill out about sixty or so questions. It asked you everything but your hat size and your IQ, I guess. This saves us a bunch of time because we would have to ask you these questions individually otherwise. You can see how much time that would take.

You were asked about your feelings about the death penalty and capital punishment. Let me just ask you if you could tell us—you've had a day or so to sleep on it and think and reflect a little bit more on it. Let me ask you if you would just share with us in you own words how you feel about the death penalty or capital punishment and your ability to actually serve on a jury of this type and render a decision? In your own words, how do you feel about it?

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[2770] yes. If you decide, on the other hand, that there was some provocation that the victim did or said something, then you decide whether or not the Defendant acted reasonably or unreasonably. Do you see what I'm getting at?

A Yes.

Q. Just summing it up, you could answer those three questions yes or no depending upon the evidence?

A That's right.

Q There would be nothing automatic about it, would there?

A No.

Q Okay. You look to the State just like in the first part of the trial. You would make the State prove to you that those questions should be answered yes; is that correct?

A That's correct.

Q If we don't, then you answer them no?

A Right.

Q Let's shift gears here for just a second. I know I'm going real fast, but we have a lot to cover, all right? Let's imagine **[2771]** again you're sitting on a jury. It's a capital murder case. Let's suppose that in that case the indictment alleges a murder during a burglary. That's a type of capital murder. We would have to prove both the murder as well as the burglary. Let's say you're convinced after hearing all the evidence in the first part of the trial that there was a murder, but let's say you didn't hear any testimony about a burglary or you had a reasonable doubt about the burglary part of it. Do you understand that the State has not met its burden in that example. In other words, if we expect you to find the Defendant guilty of capital murder, we have to prove both the murder and the burglary. We only proved the murder, didn't we?

A Yes.

Q If that were to happen—and I'm not suggesting that it would happen in this case or any other case, for that matter, Ms. Williams, but we need to cover it. The law would expect you under your oath as a juror to find that Defendant not guilty of capital murder because we didn't prove capital murder, did we?

[2772] A No.

Q We proved murder. You found him guilty of what we did prove and that's murder. Remember we said that murder is one level below the offense of capital murder. Now, that is a situation where one person knowingly or intentionally causes the death of another individual. No one is going to quarrel for a moment that any kind of murder is good. They're all bad. It's just that some are worse than others. The law allows you, in a murder case, to take into consideration all of the pertinent and important surrounding circumstances and take those all into consideration basically in allowing you as a juror to tailor the punishment to fit the crime as you decide it once you hear the evidence.

To be a qualified juror on a murder case, basically all we're looking for is the type of juror who can, number one, follow the law. I believe you can follow the law whatever that is; is that correct?

A Yes.

Q Number two, that has an open mind and will not prejudge anything, but will **[2773]** instead say, I'll keep an open mind. I will wait until I've heard the evidence in a murder case, until I've heard all of the facts surrounding a murder and then and only then, after I've heard all of the evidence, if I feel it's proper and warranted and justified to give X number of years, even if it's the minimum, then I'll give the minimum if I feel it's proper to do it. On the other hand, if I hear a fact situation once I've heard the evidence—and, of course, you haven't heard any evidence at all, have you?

A No.

Q But you're the type of person who would keep that oath in mind and will say, I'll wait and listen to the evidence and, if I hear a case that I think calls for, warrants, and justifies the maximum under the law, then I'll give the maximum whatever it is. Any problem with that at all?

A No.

Q Okay. Now, you know that the range of penalty for murder is a sentence of not less than five years in the Texas Department of Corrections all the way up to **[2774]** ninety-nine years or life and even an optional $10,000.00 fine. I gather from what you've told us, because you are the type of person who will follow the law and keep an open mind, if you hear a fact situation that calls for the minimum and you know that the minimum is a five year sentence and you feel that it's proper after you've heard the evidence, you can return a verdict of five years for murder; is that correct?

A Yes.

Q Just like you could return a verdict of ninety-nine years or life if you felt that was proper?

A Yes.

Q I gather, you haven't closed your mind to a five year sentence or a ninety-nine year sentence?

A No, I have not.

Q You will consider the full range of penalty and will wait until you've heard the facts so you can make the decision; is that correct?

A That's correct.

Q All right. Let me just cover one

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[2824] February 26, 1986, at which time the following proceedings were held.)

THE COURT: For record purposes, the lawyers have agreed to excuse juror number sixty-seven, Lourice Collier.

Ms. Sztybel, first of all, I apologize to you for being late. We started late. The lawyers are not at fault. I want you to know that. They were all here. I had some business that I got bogged down in on my regular docket today.

With that in mind, I'm not going to take much more time except to ask you to be as comfortable and relaxed as possible under the circumstances.

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[2825] VIVIAN L. SZTYBEL,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Good morning, Ms. Sztybel. How are you this morning?

A Fine.

Q I want to start out by reintroducing myself and every one else here. We were introduced on Monday, but that's been a couple of days. My name is Jim Nelson and the gentleman seated next to me is Mr. Paul Macaluso. There is another lawyer who will be involved in this for the State of Texas and his name is Norman Kinne. He will be presenting the evidence. We're all three assistant district attorneys who have been assigned by Henry Wade to handle this case for the State of Texas.

Seated to my left is Mr. E. Brice Cunningham.

MR. CUNNINGHAM: How are you

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[2828] bit, I'll talk to you and then these lawyers over here may want to talk to you a little bit also. So here we go.

I feel like it is only fair to you that you know the position of the State of Texas in this case. We have been and are

going to continue to actively seek the death penalty for Thomas Joe Miller-El. That man sitting right down there. We anticipate that we will be able to present to a jury the type and the quality of evidence to convince them, first of all, to find him guilty of the offense of capital murder and, second, to convince them beyond a reasonable doubt to answer those three questions on the board yes. The effect of those three questions being answered yes is that Thomas Joe Miller-El will be assessed the death penalty. There's no option. The Judge can't change the verdict. If those three questions are answered yes, Thomas Joe Miller-El will be taken to Huntsville and we anticipate at a time set by the law, he will be taken to the death house, injected with a lethal substance and he will have his life taken as a result of this verdict.

[2829] That's basically our position. I feel like it is only fair that you know that going in because that's what we're going to be saying from now on throughout this trial. We anticipate we can present that type of evidence. Knowing that, what really counts, I guess, are your feelings and what you think about some things. You had a chance on Monday to fill out a questionnaire.

I would guess that most people come down here thinking, well, maybe I'll serve on a civil case or be on a little shoplifting or purse snatching or something like that. You come in here and sit down and the Judge says, "Guess what, folks. You're on a capital murder case." Right after that he asks you to fill out this questionnaire and you don't have a whole lot of time to think about it. Now that you've had a couple of nights to sleep on it and time to think, I'm going to ask you, if you would, to tell us in your own words, number one, how you feel about the death penalty and, number two, whether you feel like you could serve on a jury in this type of case?

A I'm for the death penalty. I feel

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[2846] well, he really ought to get a life sentence, he doesn't deserve the death sentence, but if we prove to you that each of those questions should be answered yes, then you're required by law to answer those questions yes. Do you have any problem with that?

A No, sir.

Q I guess, the bottom line of what I'm asking you is, can you set your emotions aside and listen to the evidence and answer those questions based on the evidence?

A Yes, sir, I feel like I can.

Q Okay. That's all we ask. You can see how each of those questions could be answered either yes or no depending on what the evidence is. We're going to ask you to keep an open mind until you've heard all the evidence before you make a decision on them. Any problem with that?

A No, sir.

Q Let me switch gears here for just a minute and talk about something that we don't anticipate will happen, but it's something we need to talk about anyway just in case. I told you that we have what we call murder plus to **[2847]** make this a capital murder. Let's say there's a case where it's murder in the course of a burglary, for example. We present our case and we prove to you the murder, the Defendant knowingly or intentionally killed another human being without any legal justification or legal excuse, but you don't hear any evidence at all about a burglary, nothing, all we prove to you is murder. You can't find him guilty of capital murder in that case, can you?

A No, sir.

Q You have to find him guilty of the lesser included offense of murder. As I told you, that's not a death penalty offense in the State of Texas. Murder has the widest range of punishment that the legislature has given any crime, anywhere from five years up to ninety-nine years or life and a fine of up to $10,000.00. There's no death sentence for the offense of murder.

Now, I want to make myself clear about one thing. You mentioned self-defense earlier. If a jury finds self-defense in a murder case, that's not murder. That person is not guilty. If you find that it is an **[2848]** accident, he's not guilty. If you find that he was insane, he's not guilty. If it's killing in the heat of passion—like I have a four-year old daughter. If I saw her one time and she had been abused and the guy that did it was standing two houses down laughing and bragging about it, I would probably lose my cool and go do something to him. Well, that wouldn't be murder because it's what we call killing in the heat of passion. That's voluntary manslaughter, but it's not murder. All of those are legal justifications or legal excuses. When we talk about murder in the State of Texas, we talk about killing someone without any legal justification and without any legal excuse. Am I making myself clear?

A Yes, sir.

Q In order for you to be qualified to serve on a jury, you have to be able to consider the entire range of punishment. Now, when we say "consider", you don't have to be able to sit there right now and say, yes, I'll give him five years or, yes, I'll give him life, yes, I'll give him twenty-three years, or whatever, because you haven't heard the facts. **[2849]** You don't know what the facts are. Would you agree with me, even though it's not self-defense or accident or something like that, there are just all kinds of situations in which a murder can occur, all kinds of facts? If we sat here for hours, we could come up with more and more examples of how a murder could occur. Would you agree with that?

A Yes, I would.

Q Okay. When we say are you able to consider, what that means is, if after you've heard all the evidence, everything you're going to hear, if you believe a life sentence or a ninety—nine year sentence is called for, could you give it?

A Yes.

Q Okay. By the same token, if after you've heard all of the facts and circumstances, you've heard everything

you're going to hear, all the surrounding circumstances, the prior relationship between the parties, the whole thing, if you're convinced in your own mind after hearing all that, that a five year sentence is called for and a five year sentence is justified by those **[2850]** facts and circumstances, could you give it?

A If I've heard all the facts and evidence, yes.

Q You can't tell us right now what you'll do because you don't know the facts and circumstances. All we're asking you is, if you heard the facts and circumstances that justified it, could you give a five year sentence for the offense of murder?

A Yes.

Q I want to emphasize again—and I've said this three or four times—what we're talking about is the killing of another human being without any legal justification or without any legal excuse. All we're asking you to do is keep an open mind and listen to all the evidence and then make a decision based on that evidence. Do you feel like you can do that?

A Yes, sir.

Q Okay. You can give five years in a proper case or you can give life or ninety-nine in a proper case; is that right?

A Yes, sir.

Q Okay. Now, I've used the phrase **[2851]** no legal justification or legal excuse. We're talking about self-defense or accident or that kind of thing, but there may be other circumstances or justifications or excuses that could enter into it like we talked about. There could be hundreds of different situations where it would be murder technically under the law, but there would be all kinds of things enter into it that might cause you to say a five year sentence is appropriate. Would you agree with me about that?

A Yes, sir, I do.

Q There's a couple of other things on murder, while I'm thinking about it. In Texas we don't have to prove to

you motive for a murder. We may. You might hear evidence about it, but we don't have to prove it to you. We also don't have to prove to you that it was premeditated. Although you may hear evidence about that, but we don't have to prove it to you. Would you want us to prove either of those two things or let me put it this way, would you require us to prove either of those things knowing the law does not require us to do that?

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[2913] CHARLES M. SMITH,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Good morning, Mr. Smith. Let me quickly begin by reintroducing every one here at the counsel table. My name is Paul Macaluso and to my immediate left is Jim Nelson.

MR. NELSON: Good morning.

Q When the trial actually begins, we'll be joined by another lawyer and his name is Norman Kinne. As you may recall from the introductions on Monday, we are assistant criminal district attorneys and we work for Mr. Henry Wade and we've been designated as the lawyers to represent the State in this case.

Now, to Jim's immediate left is Mr. Brice Cunningham.

MR. CUNNINGHAM: Good morning, sir.

Q And to his immediate left is Mr. Royce West.

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[2916] unclear, by all means stop us and we'll clarify it as best we can. If there is something that you need to add, whether we touch on it or not, by all means just let us know what it is in fairness to both sides, okay?

A Okay.

Q Now, I know you were asked this question on the questionnaire itself, but let me just ask you. Knowing, of course, that this is the type case where the State is actively seeking the death penalty—in other words, we make no bones about it. We know the law allows for it and what we intend to do, of course, during the course of this trial is to provide a jury, once it is selected, with the type and quality of evidence that will convince the jury in the first part of the trial, Mr. Smith, that the Defendant, Thomas Joe Miller-El is guilty of the offense of capital murder exactly as he's charged in this indictment.

In the second part of the trial, we intend to provide a jury with the type and quality of evidence that will convince them, based on the evidence, beyond any reasonable doubt whatsoever that all the questions, **[2917]** whether it be two or three, but all of the questions you receive should be answered in the affirmative which, as you know, automatically results in this Judge, Judge McDowell, mandatorially under the law assessing a sentence of death by lethal injection for Mr. Miller-El.

Now, you understand that's our position. We are actively seeking the death penalty. Ultimately, of course, it's up to the jury to make the final decision and the final determination. I think it is only fair to let you know, as we have the other jurors, exactly what our position is throughout this trial based on the evidence that we intend to provide. Okay?

A Yes.

Q Now, as I said, you were asked this question and really, I guess, it's one of the most significant questions. It's fifty-six, and you were asked how you feel about the death penalty. Let me just ask you if you would share with us, sir, in your own words with all of us how you do feel about the death penalty and then, secondly, is there any reason **[2918]** that you know of why you could not actually serve in a case of this particular type and render a decision that would result in the death of Mr. Miller-El based on the evidence?

A I think, like I wrote down there, I believe that the death penalty probably is the only deterrent that we have against people killing each other. I don't know of any reason why—I don't have any personal reasons why I couldn't, based on the evidence, render a decision.

Q That is, you know of no reason why you could not actually participate in that decision-making process and listen to the evidence and make those decisions?

A No.

Q Now, Mr. Smith, let me just ask you: Obviously, you're in favor of the death penalty for certain types of very serious offenses; is that correct?

A Yes.

Q Have you ever felt differently about it? Has there ever been a time in your life, for example, where you were against the death penalty or just felt differently about it

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[2939] A Yes.

Q Even though you might have a personal desire for a death sentence, if the State doesn't prove to you those questions should be answered yes, you must answer the questions no. Do you see what I'm getting at?

A Yes.

Q The flip side is true, too. You might say, I don't think the guy ought to die. I'd vote for a life sentence, if I could, but in all honesty the State proved yes, yes, yes. Can you do that?

A Yes.

Q Let's shift gears here for a second, Mr. Smith, to something that is very, very important. I'm not suggesting that it would occur in this case, but we need to discuss it at this time. That's a situation where, let's say, you're on a hypothetical jury, you're on a hypothetical capital murder case, and let's say that the State has alleged murder during a burglary, which you know is another type of capital murder, and

you have no doubt, along with the other jurors at the end of the first part of the trial, that the **[2940]** Defendant is guilty of murder. There's no doubt about it, but you didn't hear any testimony about any kind of a burglary or you have a reasonable doubt about it. Well, you know, for us to expect you and the law expects you, to convict someone of capital murder, the State must prove both of those components, the murder and the burglary and we didn't do that, did we, in that example?

A Right.

Q Do you see what I'm getting at? You can't convict that individual of capital murder because we didn't prove capital murder. What did we prove?

A Regular murder.

Q Right. You got it. Now, if that were to happen, then the range of penalty, as I said earlier, is completely and totally different. Let's forget about mandatory life or death. That's just all out the window. It's not even a consideration. We're talking about a murder case. Mr. Smith, to be qualified as a juror on a murder case, regular murder case, all the law expects of you is what I think you already are and that is, number **[2941]** one, to be an open-minded person and expects you, naturally, to follow the law. I gather you're the type of person—you've been in the service and you know that there are certain things that you have to do whether you like them or you don't like them. Would you agree with me?

A Correct.

Q Do you feel that way about the law as well?

A Yes.

Q In other words, there may be some things that you disagree with, but we all do our best, of course, to certainly try to follow the law and I gather you would in that respect, would you not?

A Yes.

Q All right. Well, the law says and the law allows a very, very broad range of penalty for the offense of murder, as I said earlier, to encompass the infinite number of circumstances under which one person could knowingly or intentionally cause the death of another.

While we're on the subject, **[2942]** briefly, the Judge will actually give you definitions of those phrases, knowingly and intentionally. They may be somewhat different from what you commonly think those words mean. A murder is a knowing and intentional killing of another individual. While that would have to be done without any legal excuse or any legal justification such as, like I said, self-defense or accident or insanity or a crime of passion, there could be a myriad of factual or practical, seat-of-the-pants, justifications or reasons that you would be allowed to consider during a murder trial when you learn about the relationship between the parties, the backgrounds of the various individuals and so forth that would tell you that one case deserves X amount and another case deserves XX and so forth and so on. Do you see what I'm getting at?

A Yes.

Q Now, what the law expects, of course, to be qualified as a juror is to just keep an open mind. Do you consider yourself an open-minded individual, Mr. Smith?

A Yes, sir.

[2943] Q That's all they expect of you. You haven't heard any evidence about a murder case, have you?

A No.

Q The law does not expect you to conjure up in your mind a set of circumstances as you sit there now where you would give X number of years or ten X. All the law says is this: I'll follow the law. I'll follow that range of penalty and, if I hear a case that I feel justifies, warrants and calls for, where I feel it's the right thing to do under the facts after I've heard them to give the maximum, I'll give the maximum whatever it is. That's the law. On the other hand, whether I can think of a case now or not, it doesn't matter. If I hear a

case that I feel, after I've heard the facts, calls for and warrants and justifies and I think it's the right thing to do, whether I can think of it now or not, to give the minimum, then I'll give the minimum whatever it is. Any problem with that at all?

A No.

Q What I'm getting at is, the law sets the range of penalty as low as five years **[2944]** in the Texas Department of Corrections all the way up to ninety-nine years or life to allow you as a juror to wait until you've heard all of the evidence, all the backgrounds, all the facts and circumstances, and then you decide whether it should be a five year case, fifteen year case, twenty-five year case, a ninety-nine year or life case. Can you do that?

A Yes.

Q If you heard a case that called for it and, like you say, warranted it and justified it in your mind the minimum, knowing the minimum is five years, do you have any reason why you couldn't assess a penalty of five years in the Texas Department of Corrections for murder?

A No.

Q Bear in mind that it may be difficult for you to give either the minimum or the maximum. It may require some special facts and circumstances before you would say, I'm going to give about five years in the penitentiary for killing somebody, to commit murder, but you will allow that there may be those circumstances out there, will you not?

[2945] A Yes.

Q If you hear them, there's nothing to prevent you from giving five years, is there?

A No.

Q The same thing would hold true for the upper range. It may take some real special facts before you give ninety-nine years or life, but if you see them and you hear them, you'll give ninety-nine years or life, will you not?

A Yes.

Q Now, there's one other matter here. If you're considering the range of penalty for murder, not capital murder, but murder, the law allows you to take into consideration certain—what the Judge would actually instruct you are certain aspects of the parole law. What it just boils down to—and I don't want to muddy the water, but basically what it says is, even though the Judge will give you instructions as to certain things that are taken into consideration in deciding when somebody is eligible for parole, whether it be five years or ninety-nine years

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[2985] LINDA C. BAKER,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Good afternoon, Ms. Baker. As I was introduced to you on Monday, my name is Jim Nelson. I want to reintroduce the other people who will be involved in this trial. Sitting next to me is Paul Macaluso and another person who will be involved in this for the State of Texas is a man by the name of Norman Kinne. Mr. Kinne will present the evidence for us in this case. The three of us are assistant district attorneys here in Dallas and we've been assigned by Mr. Wade to handle this case for the State of Texas.

Next to me is Mr. E. Brice Cunningham.

MR. CUNNINGHAM: How are you, Ms. Baker?

Q Next to him is Mr. Royce West.

MR. WEST: Ms. Baker, good

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[2988] because the law requires me to do that. I'm not naturally nosey or trying to bother you or badger you in any

way, but I need to ask things in a certain way under the law and because we have such a short period of time to find out about these things. I hope you will be patient with me and, if I say anything that you don't understand or if I don't make myself clear or if you have any questions, I hope you will stop me so we can get them cleared up.

With that introduction, let me just start out. I feel like it's only fair, Ms. Baker, that you know what our position is in this case. The position of the State of Texas in this case is that we are actively seeking the death penalty for Thomas Joe Miller-El. We're actively seeking to have him executed. We feel that we will be able to present to a jury, the twelve people, the type and quality of evidence necessary to, first of all, convict him of capital murder and the type and quali[t]y of evidence to, in the second phase of the trial, answer three questions yes. If those three questions are answered yes, Judge McDowell has no option but to sentence that man **[2989]** sitting right down there in the light blue suit to die.

That's what the law says.

If the three questions are answered yes, he gets the death sentence. Ms. Baker, we talk a lot about things in the abstract. I would guess you've had discussions with people about the death penalty and how you feel about the death penalty and you kind of think about it. You hear about somebody being executed and, well, that's fine or that's good or that's bad or whatever, but you're not really involved. You're kind of separated from it. I want you to understand and I think it's only fair that we make it clear to you that now it's real.

If the jury answers those three questions yes, that man right down there in the light blue suit will be taken from here to the penitentiary in Huntsville, Texas and placed on death row. He will stay on death row until the time appointed by law and then he will be taken from his cell on death row and placed in a cell near the death house. On the morning that the law prescribes, he will be taken from that cell near the death house just a few steps away and **[2990]** placed on a gurney. He will be strapped down and he will be

taken into what we call the death house. At that point he will have an IV placed in his arm, in one of his veins. Someone will put a lethal substance in that IV and it will be pumped into his body until the life is gone from him, that man right down there. That's what we anticipate is going to happen, Ms. Baker, if the evidence comes out as we anticipate it will. Again, the reason I say that is so you will understand that we aren't really talking in the abstract anymore. We're talking about here and now and real people and real death.

Now, you had a chance yesterday to fill out a questionnaire—or Monday. Excuse me. You were asked your feelings about the death penalty on that questionnaire. If you would, I'd like you to tell us in your own words, number one, how you feel about the death penalty and, number two, how you feel about your ability to serve on a jury like this where you may have to make this life or death decision?

A First of all, I am not totally in **[2991]** favor of the death penalty. I feel that it has been reinstated because of the overcrowding that we have in the jail situation now. I can't honestly say that I would be able to sentence another human being to death. I just don't think I could live with myself knowing—

MR. CUNNINGHAM: Your Honor, we can't hear.

MS. BAKER: What didn't you hear?

MR. WEST: The last part.

A Okay. I don't think that I could live with myself knowing that I had sentenced someone else to die. I mean, I was not there. I did not witness it. No matter what evidence you may bring before me.

Q Okay. Ms. Baker, I want you to understand one thing and that is no one is going to force you to serve on this jury. If you tell us that you can't do it because of the feelings you just expressed that you couldn't live with yourself, no one is going to force you to serve on this jury. The law requires you to come down here and make yourself available for us to talk and be what we call a

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[3007] never been in this situation before. I have no idea how long it would take me to get over it.

Q Do you still feel like you could take the oath?

A If I were chosen, yes, I could take the oath. I'm not going to say that I would have regrets about it later on, but that is my job as a citizen. Someone has to do it.

Q Let me shift gears here for just a minute and talk about something else that may come up. We don't anticipate that it will, but it might. If we were to prove to you not capital murder but just regular murder, then the death penalty is not an issue any more. At that point the range of punishment is different. Now, when I talk about murder, I'm talking about the knowing or intentional killing of another human being without any legal justification or excuse. In other words, a person know they were going to kill somebody and killed them without—it wasn't self-defense. It wasn't an accident. It wasn't a crime of passion. They weren't insane at the time. They knew what they were doing and they killed somebody knowing that they were going to **[3008]** kill the person. That's murder in the State of Texas.

Now, if you convicted someone of knowingly or intentionally causing the death of another human being, what do you think, just in your own mind personally, should be the minimum sentence that a person should be assessed for killing another human being without any legal justification or legal excuse?

A Knowing that he was going to kill the person and he knew that he was going to do it, I would say life. He's still living, but I think he is a menace to society.

Q Okay. If you were a juror on that type of case, your personal feeling would be to assess a life sentence; is that correct?

A Yes.

Q Could you ever under any facts and circumstances whatsoever assess a sentence as low as say fifteen years?

MR. WEST: Your Honor, I'm going to object at this point in time. Counsel is trying to get Ms. Baker to commit to a particular punishment without **[3009]** giving her the benefit of the full range of punishment, from five years to ninety-nine years or life and a $10,000.00 fine. I would object to Counsel attempting to get Ms. Baker to commit to what sentence should be imposed,

THE COURT: Mr. West, I'm going—

MR. CUNNINGHAM: Your Honor, that is improper in that the question should contain if she believed in her mind that the proper sentence should be fifteen years based upon the facts and circumstances that she had heard in that case.

THE COURT: I'll let Mr. Nelson ask his question his way. I understand that the defense has added some qualifications, but the Court will ask the ultimate question. Go ahead, Mr. Nelson.

Q Did you understand my question, Ms. Baker?

[3010] A Would you repeat it, please?

Q Okay. Could you ever under any circumstances where someone has been convicted of the offense of murder as I've set it out, knowingly or intentionally taking another human life, assess a sentence as low as fifteen or twenty years, for example?

A I think it depends on the circumstances.

Q Okay. You stated earlier that you feel that you would like to see a life sentence because they have taken a life; is that right?

A If they proved it, yes, but there are different degrees no matter what. It could be someone that said, well, I'm going to go here and, if this happens, then I will kill no matter what, but in a sense that is—he's holding up for his own life. It's either kill or be killed and in a way that is self-defense.

Q You understand, if a jury finds self-defense, then a person is not guilty of the offense of murder. It's not murder any more. He's just not guilty.

A Uh-huh.

Q If the jury finds that it was a **[3011]** killing done in passion—for example, if somebody raped my little and I found out who did it and he was standing houses down laughing about it and I went and killed him, that wouldn't be murder. It would be what we call voluntary manslaughter. When we talk about murder, we're talking about the intentional taking of another life without any legal justification any legal excuse whatsoever.

A Do you not agree that someone trained in law procedures can make things—appear as what they want to project them to be?

Q I think there are some people that are capable of doing that, yeah.

A Then it's all in the way that it is presented to you and you have to draw your own conclusions.

Q Right. What I'm asking is—first of all, assume with me, if you will, that you as part of a jury have convicted someone of knowingly or intentionally taking another human life without any legal justification of legal excuse. You convict them of murder. Having done that, could you, under the proper facts **[3012]** and circumstances in your mind, assess a life sentence?

MR. CUNNINGHAM: Your Honor, that is an improper question. If she felt that it was proper based upon the facts and circumstance of that case and she believed that it should be five years—

MR. NELSON: I asked about life.

MR. CUNNINGHAM: Okay.

THE COURT: Go ahead. If that was an objection, I'll overrule it. Go ahead.

Q Could you, under the proper facts and circumstances in your mind give a life sentence for that offense of murder?

A I told you at first, yes, I believe in a life sentence. If you're asking me could I in any circumstance go lower, yes, I could depending on the circumstances.

Q Could you ever go as low as five years?

A I don't know. I can't say.

Q Okay. I told you at first I might **[3013]** have to try to pin you down on some things. The law requires me to do so on this. I'm not trying to be rude and you're answering the same way most people would. Because you aren't there, it's hard to know. But I have to ask you, if you convicted someone of murder, knowingly or intentionally taking another human life, after hearing all the facts and circumstances, everything about the case you're going to know, it's not self-defense and it's not an accident and it's not insanity. It's none of those.

A Can you give me a hypothetical situation?

Q I'm not allowed to under the law. I can't do it. If after you've heard all the facts and circumstances, if you believed in your own mind that the minimum sentence was appropriate, could you give five years for the offense of murder?

A I'm sure that I could.

Q Ms. Baker, my time has run out. In fact two minutes ago my time ran out. I appreciate you being so patient with me and I appreciate your time and the answers to the

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[3017] (Whereupon, an off-the record discussion was held, at which time the State exercised a preemptory strike against Ms. Baker.)

THE COURT: Ms. Baker, I want to thank you for your service down here Monday and again today.

(Whereupon, Ms. Baker left the courtroom, after which the following proceedings were held.)

MR. WEST: Your Honor, may the record, reflect that the prospective juror, Ms. Baker, was in fact a black female. Out of the ten strikes used by the State, the State has used seven of them on blacks.

THE COURT: Mr. Nelson, do you want to reply to that?

MR. NELSON: Yes, Your Honor. The State's reason for exercising a preemptory strike in this particular case had

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[3020] DEBRA S. McDOWELL,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Good afternoon, Ms. McDowell. You may remember us from way back on Monday. I'm Paul Macaluso and this is Jim Nelson. That's Brice Cunningham and Mr. Royce West is over there on the other side. We are the lawyers, over on this side of the table, that represent the district attorney's office. We're the prosecuting attorneys and we work for Henry Wade and we've been designated to represent the States in this case.

Mr. Cunningham and Mr. West are defense attorneys who have been appointed by the Court to represent the Defendant. He is charged with capital murder as I'm sure you know. He's at the very far right. You may be able to see him it you learn forward. He's charged with capital murder, the most serious level of offense under the laws of this state.

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[3023] hesitated. You just tell us whatever is on your mind if you feel it might affect your service as juror on this very important case.

Now, we have five jurors so far in three and a half weeks of selection. We need seven more to begin the trial and you could be number six. We're looking for the people that we feel, both sides feel, are certainly qualified and best suited and who we feel will be the most fair and the most impartial. That's why we need to talk to you and ask you some questions. All right?

Now, let me tell you what our position is so that there is absolutely no mistake about it whatsoever. Ma'am, we are actively seeking the death penalty in this case for this Defendant. Although things have gotten a little bit lighter because we've been doing this for three and a half weeks and we have a sense of humor still, the bold-face reality of the situation if that this is a capital murder case and the State is actively seeking the death penalty. We know that the law allows for it and we intend to provide a jury—and that would mean you if you were on **[3024]** this jury—with the type and quality of evidence that would convince them beyond any reasonable doubt that Mr. Miller-El is guilty exactly as he is charged in this indictment of capital murder. Then in the second part of the trial, again we intend to provide the jury with the type and quality of evidence that convinces them beyond any doubt based on reason whatsoever that those three questions should be answered yes which you know results in mandatory sentence of death.

I just tell you that, as we've told every other person we've talked to, because just out of an abundance of fairness to put on notice of what we intend to prove under the law by the evidence once the trial begins and what the strikes are.

Now, I know you were asked this questions and given precious little time to respond to it really. You've had a couple of more days to think about it and you may want to add something to it or you may not. Let me just ask you how you feel in your own words first about the death penalty itself, capital punishment, and then your ability to actually

[3025] serve on a jury of this type and answer questions that you know would result in the Defendant being executed?

A I feel like, if there was a shadow of a doubt, that it should not be given, but if it is the only thing that would fit the crime, it must be given.

Q You believe in the death penalty, do you not?

A Yes.

Q For very serious types of crimes, I gather?

A Yes.

Q What sort of crimes come to your mind that you feel the death penalty would be proper for? I know it depends on the individual facts, of course, but you know as a category of offenses. You know, we could probably agree that people shouldn't be executed for theft or stealing tires or something like that, but what sort of crimes do you think the death penalty would be warranted depending upon the individual facts and circumstances?

A When there has been an unnecessary

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[3046] said something to provoke the killing, even though it's not going to result in a not guilty verdict, do you understand, then decide whether the Defendant in killing the individual acted reasonably or unreasonably in the light of human experience. Do you see? Which in that case, you answer the question yes or no depending upon how you decide. Do you see what I'm getting at?

A Yes, sir.

Q Is there any reason why you couldn't answer any of these three questions yes or no depending upon the evidence?

A None that I know of.

Q Let's shift gears here for just a second and cover something that is very important. I don't think you would have any trouble with it, but let's just imagine again that you're on a capital murder jury. Let's say it's a capital mur-

der and the indictment alleges a murder during a burglary. Let's say you hear the evidence along with the other jurors and you don't have a doubt in whatsoever based on reason that the murder occurred, but let's say you didn't hear any testimony about **[3047]** the burglary or you have a reasonable doubt. You're not sure the murder occurred during a burglary. You understand, if we charge someone with capital murder of that type and we expect you to convict him of capital murder, we've got to prove both the murder and the burglary, you see, and we didn't do that. See, we didn't prove the burglary. We proved the murder, but didn't prove the burglary. Therefore, we did not prove capital murder. You have to find that defendant not guilty of capital murder because we didn't prove it. Instead you find him guilty of what we did prove, which is what? Murder.

A Yes, sir.

Q If that were to happen—I'm not suggesting it's going to happen in this case. We've alleged a murder during a robbery. If that were to happen, you can just forget about automatic life or automatic death. Those aren't even possible—you know, there's nothing—

A It is just a regular murder then?

Q A regular murder.

A I know what you mean. The **[3048]** punishment would be less.

Q Yes.

A Different?

Q Right. Altogether different. The range of penalty is as broad as any offense under the laws of this State. It's broad because, I think every one will agree—the legislature has set it as broad as it has to encompass the infinite number of circumstances under which murders can be committed. You get to tailor the punishment to fit the crime. In fact, didn't you say something in there about that?

A Yes, the severity of it.

Q Right. You get to listen to the facts and then decide what penalty is actually called for after you and the other jurors have heard all the evidence. All that requires of you to be a qualified juror on a murder case, no capital but murder, is number one—about three things actually. One is that you will follow the law because you believe in the law; is that correct?

A Yes.

Q If the law sets the range of **[3049]** punishment at five years to ninety-nine years or life and an optional $10,000.00 fine, you'll follow that law; am I reading you right?

A Yes, sir.

Q Furthermore, that you have an open mind. You haven't heard any evidence on this case about a murder case, have you?

A No.

Q That's all the law expects. You haven't heard any evidence on which to make that decision yet, so you can't make the decision, can you? All the law expects you to do is follow the law, keep that open mind and tell us that you will keep the open mind until you've heard all of the evidence in a murder case and then after you've heard all of the evidence, if you feel the facts that you hear in that murder case, even though you know it's murder. I mean, murder is murder. But after you've heard all the evidence, if you feel that the facts and circumstances surrounding that murder calls for and warrants and justifies the maximum sentence and you feel it's the right thing to do, the proper thing to do, you would give the maximum which you know is ninety-nine **[3050]** years or life and a $10,000.00 fine? Can you do that?

A Yes.

Q I'm not saying it would be easy. I know you would have to have some special facts to do that. The same thing would hold true for the minimum. You know, it wouldn't be easy to give the minimum. You would have to have special facts, wouldn't you?

A Yes, sir.

Q But after hearing all of the evidence, if you hear a fact situation the calls for, warrants and justifies the minimum and you know that the minimum is five years and you feel it's the right thing, the proper thing, to do, would you vote for a five year sentence, five years in the Texas Department of Corrections for murder?

A Yes, sir.

Q You paused there. I know it sounds—

A Well, I don't know.

Q You would keep an open mind and consider it, wouldn't you?

A Yes, sir.

[3051] Q And if you felt it was proper, you could vote for five years?

A Yes, sir.

Q If you felt it was proper after you heard all of the evidence?

A Yes, sir. If I've heard everything and I know what the law says that we have to decide, I could.

Q In other words, you will tailor the punishment to fit the crime once you've heard all of the facts and you can make a decision. You can't make a decision now, can you?

A No. That's why I hesitated because I don't know until I've heard it.

Q You haven't closed your mind to a five year sentence, have you?

A No, sir.

Q You haven't closed your mind to a ninety-nine year of life sentence, have you?

A No, sir.

Q Let's shift gears here for just a second. Let's talk about something the Judge said the other day. You know the burden of proof, of course, is always on the State to

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[3090] there are no right or wrong answers to anything any of us are going to ask you. We're just trying to find out how you feel about some things. We're going to discuss some law with you and give you and idea of what's to come if you should serve on this jury. We'll just ask you to be as honest with us as you can and be open and bear with us a little bit. The law requires us to be somewhat tedious and somewhat pointed at times, but we're not doing it to be rude. It's just necessary in the context we're in.

A I understand.

Q If you have any questions or anything comes up that I confuse you, which I have a tendency to do, or I get to talking too fast like I do sometimes, stop me and let's make sure we're clear on things before we move on.

I feel like it is only fair, Ms. Willard, to tell you going in what our position is in this case. The State of Texas through Mr. Kinne, Mr. Macaluso and myself is actively seeking the death penalty for that man right down there, Thomas Joe Miller-El. We **[3091]** anticipate we will be able to present to a jury the type and the quantity of evidence to convince a jury to find him guilty of the offense of capital murder and type and quality of evidence to convince a jury to answer three questions yes. If those three questions are answered yes, then the death penalty will be assessed by Judge McDowell. He has absolutely no options in the matter. The jury makes the decision. One the jury render their verdict and the decision is made, he cannot change it.

Our anticipation is that, if those three questions are answered yes, that man sitting right down there will be taken to Huntsville, Texas and on a date set by law will be executed and have his life taken by lethal injection. That's basically our position. Everybody has their position on things, I guess, but the one that really matters right now is yours.

You had a chance on Monday after you tried to get over the shock of finding out this was a capital murder case to fill out a questionnaire. One of the questions on there **[3092]**

was number fifty-six which related to your feelings about the death penalty. You answered it in quite a bit of detail, but you've had a couple of days to sleep on it and think about it. I would like to ask you, if you would, to tell us in your own words how you fell about the death penalty, number one, and whether you feel like you could serve on a jury in this type of case?

A Do you mean do I believe in the—

Q Are you in favor of the death penalty, against the death penalty, do you feel like it serves a purpose?

A May I explain?

Q Sure.

A Well, I feel that—of course, I know the bible says an eye for an eye and a tooth for a tooth, but to go further into detail, I feel like if you go and have premeditated thought about doing somebody bodily injury, then yes I do believe in the death penalty. If murder was not the utmost in your mind, then I'm not real sure what I – I don't know if I can give you an answer on that or not. I have mixed emotions about that.

[3093] Q Okay. How do you feel about your ability to sit on a jury in this type of a case knowing the weighty issues involved? Do you feel like that is something you're suited to do or you can do? Understand it's not going to be a picnic for anybody.

A No, sir. I don't know if I could. I believe in capital punishment. I don't know if I could be the one to do it, to be on the jury to convict someone. I don't know whether I could or not. It may come to the time that I may have to decide.

Q Okay. Well, let me go into a couple of other things and let's come back to this. Capital murder — in Texas there's murder and then there's capital murder. The only thing the death penalty applies to is capital murder and that's murder under certain special circumstances. For example, if a police officer or a fireman, in the course of their duties, is killed by someone, murdered by someone, that's

capital murder. A mass murder like the incident at Ianni's a year or two ago, mass killing is capital murder. Murder for hire, if I hired Mr. Macaluso to kill someone

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[3157] VIRGINIA M. WEBB,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified and follows:

EXAMINATION

BY MR. MACALUSO:

Q Good morning, Ms Webb.

A Good morning.

Q Let me begin by reintroducing everybody here. I'm Paul Macaluso and this Jim Nelson. Ma'am, once the trial begins we'll be joined by Norman Kinne. He's not here now, of course. We are all assistant criminal district attorneys and we work for Henry Wade. We've been designated to represent the State in this case.

Now, to Jim's immediate left if Mr. Brice Cunningham.

MR. CUNNINGHAM: Good morning, Ms. Webb.

Q I imagine sometime while we're talking he will be joined in the next chair by Mr. Royce West.

A Yes. I saw him on Monday.

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[3161] it or not. Let me tell you also that no one is going to try and quarrel with you and no one is going to try and play lawyer with you too much, I guess, or try and talk you into or out of any position. That's not our responsibility to do that. Just let us know how you feel in all honesty.

Now, let me tell you where we stand in this case. As we've told every other juror at this particular point, we're going to tell you. We are actively seeking the death penalty in this case for Thomas Joe Miller-El. We're making no

bones about it. We know that the law allows for the death penalty in a proper case under the proper circumstances. We fell that once this trial begins—we have six jurors now and we need six more. Once this trial begins we're going to be able to present to this jury both the type and the quality of evidence that will convince them beyond any reasonable doubt whatsoever that Mr. Thomas Joe Miller-El is guilty of capital murder just exactly as he is charged in the indictment.

Then in the second phase of the trial where the actual penalty is determined, [3162] once again we intend to be able to provide the jury with the type of qualify of evidence that will convince them beyond any reasonable doubt whatsoever that those questions should be answered yes beyond a reasonable doubt which, as you know, results automatically in the death penalty and the Judge assessing a sentence of death. Those are the stakes and that's what we're about. Again, as I said earlier, it's only fair to you, as—I've kind of lost count. You're number—

A Seventy-six.

Q The jurors that we've talked to we've let know exactly what out position is from the outset even though ultimately it's up to the jury to make these decisions, but we just want you to know where stand.

Now, I know you were asked this question and it comes down to this, I guess, basically: Question fifty-six asks you—without much preparation you had to answer that question, but how do you feel about the death penalty. Let me just ask you, having been given three or four night to sleep on it and think about it and expand on it, if you have, [3163] if you would just share with us, Ms. Webb, your personal feelings about the death penalty and your ability to actually serve on a case of this type and render a decision that could result in the death of another individual?

A Well, it's a hard decision to make to ever take man's life. I mean, you would have to really feel in your heart that he's guilty and without any doubt, but at the same time, the way our criminal system is listing right now, if I felt a man

was guilty truly and had done something like that, I could sentence him to death because I would rather do that than see him go to jail for seven or ten years and be back on the streets and perhaps kill or whatever somebody else.

Q Okay. I gather from what you said that you feel, if even somewhat reluctantly, the death penalty has a purpose in our society?

A Right.

Q And you do approve of that?

A Yes.

Q In certain situations, for certain individuals who commit certain types of crimes?

A Yes.

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[3185] sentence, if you had that to consider as a juror, put those aside and simply answer the questions and, like some people have said, kind of act like an umpire, and impartial judge of the evidence to decide whether of or not the State has proven beyond a reasonable doubt based on the evidence that the questions should be answered yes. If you do, then answer them yes. If you don't, follow your oath as a juror and answer the questions no. Can you do that?

A Yes.

Q Okay. Let's shift gears here for just a moment and talk about a situation that I'm not suggesting will occur, but we have to discuss it just in an abundance of caution. Hypothetically again imagine that you're on a capital murder jury, not this one, but another one. Let's say the State has alleged—I didn't even tell you earlier the different types of capital murder, but one type of capital murder we're talking about here is a murder where one person knowingly or intentionally causes the death of another individual. Murder is done without any legal excuse or legal justification. Now, there may **[3186]** be myriad of factual excuses of justification that we could take into consideration if you're on a jury,

the relationship between the parties, you know, what led up to this murder—and I can't give you examples. You know as well as I do—we've both lived long enough to know that there are myriad of different reasons, an infinite number of reasons, that could lead up to one person killing another that fall short of a legal excuse. There's no legal excuse for it, but there may be all sorts of human excuses. Do you see what I'm getting at?

A Yes.

Q I'm not going into any justifications, but considerations, let's put it that way. If you commit murder, that's not a capital offense itself. You can't receive the death penalty just for murder in Texas. It must be murder of a policeman, fireman, jail guard, murder for hire and so forth and so on. Those are the categories, murder during the commission of another offense. We've alleged murder during a robbery. Murder during a **[3187]** burglary. Murder during a kidnapping, arson or a burglary.

Now, let's suppose you're on a capital murder jury, but not one like this where we've alleged murder during a robbery, but let's say murder during a burglary. You know, of course, to prove capital murder to you, we have to prove both the murder and the burglary or murder and a robbery, murder and a rape. Do you see what I'm getting at?

A Yes.

Q All right. If we expect you to find him guilty of capital murder—let's say during this hypothetical trial, we prove the murder, but we don't hear any testimony about the burglary, as an example. Do you understand that you couldn't find that Defendant guilty of capital murder under those circumstances simply because we didn't prove capital murder. What did we prove?

A Just that they murdered somebody.

Q Right. So you would have to find them not guilty of capital murder and find then guilty of what we did prove, which was murder. If that were to happen, ma'am, forget all about **[3188]** mandatory death or life. Those are out the win-

window and they're not even a consideration. Under those facts, under a murder case, if you were on a jury, having convicted somebody of murder, the law sets out the broadest of all ranges of penalty under the laws of this state. I think we all agree here that it's as broad as it is to encompass what we talked about earlier, the infinite number of circumstances that you could hear as a juror surrounding the murder of one individual.

Now, bear in mind that we all respect human life and we all know that murder is a bad proposition to begin with, but the law allows you to take into consideration the fact that murders are just worse than others. The law also allows you and expects you as a qualified juror on a murder case to keep an open mind. I get the impression you are an open—minded person. You've already told us you're the type of person who would follow the law and you respect the law.

A Right.

Q It boils down to this, ma'am: The law does allow you to tailor, as the old cliché **[3189]** goes, the punishment to fit the crime once you've heard all of the facts surrounding the murder. Now, bear in mind that murder is, like I said earlier, a situation where one person knowingly or intentionally causes the death of another without any legal excuse or any legal justification. In other words, it's not a situation where someone is killed in self-defense. If you believe that someone acted in self-defense, you have to find them not guilty. Or if someone was insane or it was an accident or a crime of passion, but where someone intended to kill somebody for whatever reason they have. There could be a myriad of different reasons.

Now, all the law says to be a qualified juror that, one you will follow the law and consider that full range of penalty and then wait and keep your mind open until you've heard all of the evidence and then decide what the proper punishment should be, what you feel is proper, based on the facts as you decide them to be. In other words, you haven't closed your mind to the lower range or to the upper range. If you're on that jury and once you've **[3190]** heard all of the

evidence, if you feel it's proper and warranted, justified and just simply the right thing to do to give the minimum, you will give the minimum whatever it is under the law. The same thing would hold true, if you've heard all the facts of a murder case, if you've heard one where you think it's proper, warranted and justified and again simply the right thing to do after you've heard all of the evidence to give the maximum, you'll give that. Can you do that?

A Yes.

Q Even bearing in mind that the minimum, for example, for murder is five years. Bear in mind that you're not expected to sit there and think of a situation now where you would say, well, I can't think of a situation where I would give five years. No one expects you to do that. You're just expected, to be a qualified juror, to be able to tell us, if you see a case that to your way of thinking after you heard the evidence, if the facts call for it and it's five years, I'll give five years even though it may be tough to do to give the minimum. The same thing would hold true for **[3191]** the maximum. If you hear a case that you think calls for ninety-nine years or life, even though it may take special facts, a real aggravated case to do that, you would give ninety-nine years or life?

A Yes.

Q Can you do that?

A Yes.

Q If it's the law, you're going to follow it; is that correct?

A Right.

Q I've just got one or two other matters to cover with you. You understand that the Judge said and, as we said earlier, the State has the burden of proof and the law allows us to prove a case in a variety of ways. As the Judge told you the other day, the law does allow the State to prove a case, even a case of capital murder, with the testimony of one eyewitness if you believe that eyewitness beyond a reasonable doubt. Could you do that, Ms. Webb?

A Yes.

Q Motive and premeditation are two things that the State is not required to prove

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[3246] MR. CUNNINGHAM: Thank you, Ms. Webb. Pass the juror.

THE COURT: What says the State?

MR. MACALUSO: Your Honor, the State would be pleased to accept Ms. Webb as a juror on this case.

MR. CUNNINGHAM: Your Honor, may we approach the bench?

THE COURT: Surely. You can just keep your seat. Sometimes we do things over here that we don't need the reporter for.

(Whereupon, an off-the-record discussion was held between counsel and the Court outside the hearing of the prospective juror.)

THE COURT: Ms. Webb, you will be excused from service in this case. Off the record, Pam. (Whereupon, Ms. Webb left the courtroom, after which the following proceedings

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[3322] LOUIS G. WOLTERS,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Good afternoon, Mr. Wolters. Let me begin briefly by reintroducing everyone here. I'm Paul Macaluso and this is Jim Nelson. When the trial begins, we will be joined by another fellow by the name of Norman Kinne. We are assistant criminal district attorneys here in Dallas County and

we work for Henry Wade. We have been designated as the lawyers to represent the State of Texas in this case.

Now, the gentleman to Jim's immediate left is Mr. Brice Cunningham.

MR. CUNNINGHAM: How are you this afternoon?

MR. WOLTERS: Just fine.

Q To his immediate left is Mr. Royce West. I imagine you recall from Monday that they were introduced to you. They're the

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[3325] yet and I don't think we'll start with you. We just want to know how you feel. It's just that simple. We have our position with regards to this case, but it really doesn't matter. What we're concerned about is how you feel. If you have a question about anything, by all means ask it. Don't be bashful. If there is something you would like to tell us, go ahead and ask it or tell us at any time if you feel it would impact on your service as a juror. Bear in mind that no one is going to try and change your mind.

Now, let me tell you where we stand. The State is actively seeking the death penalty in this case for Mr. Thomas Joe Miller-El. We know that the law allows for it, Mr. Wolters, if the proof is there. We intend simply to provide the jury with the type and quality of evidence in the first part of this trial that will convince this jury, once it's composed, beyond any reasonable doubt whatsoever that Mr. Thomas Joe Miller-El is guilty of capital murder just exactly as he's been charged.

In the second part of the trial, **[3326]** as the law requires, we intend to provide the jury with the type and the qualify of evidence that will convince them beyond a reasonable doubt that the questions the Judge would submit to the jury should all be answered in the affirmative, yes, yes, yes, which you know under the law of Texas results automatically in a sentence of death. Do you see what I'm getting at?

A Yes, I do.

Q The only reason I'm telling you that is because—is just to let you know, as we have let every other prospective juror that we've talked to know, exactly what our position is based on the evidence and provided for by law and what we intend to prove and what our position will be during the course of this trial. As I said earlier, everyone has got their position, as the old saying goes. The position that really counts ultimately will be the position of the jury.

Now, you were given precious little time to fill these questionnaires out, about fifty-nine separate questions. One of them is, of course, about your feelings about **[3327]** the death penalty and whether or not you could serve on this jury. You've had two or three nights to kind of think about it. Let me just ask you before we go any farther, would you just share with us, all of us, your personal feelings about the death penalty, how you feel about capital punishment, and then secondly your ability to serve or not to serve on this type of case and make a decision that could ultimately result in the execution of the Defendant?

A The first part of the question, I believe that the death penalty is necessary in a lot of cases. I believe that society is only as effective as the laws it enforces. Although nobody likes the idea of having to sit in a case like this, if not, then the system won't work.

MR. WEST: Would you speak up some?

A I'm sorry. If nobody wants to sit on this, and nobody does, then the system will not work. It's necessary. It's a duty and I believe everybody has a responsibility to that.

Q In other words, you do—you've

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[3351] A None at all.

Q You would just let the law take it's course without regard to whether it's the death sentence or a life sentence. Fair enough?

A Fair enough.

Q Okay. Let's shift gears here because I'm just about out of time, Mr. Wolters, and I've got a couple of other real important things I would like to cover with you. Let's imagine for a second that Mr. Wolters is sitting on a hypothetical capital murder jury. Let's say it's a murder during a burglary. You're convinced along with the other jurors after the first part of the trial, the first stage, that a murder occurred. You don't have a reasonable doubt about it. No doubt about it at all, but you didn't hear any evidence about the burglary or you had a reasonable doubt about it.

You understand, in a situation like that, the State has to prove both components of the offense of capital murder, the murder and the burglary, if we expect you under your oath as a juror to find someone **[3352]** guilty of capital murder. Am I making myself clear?

A Yes. It's my understanding that this is murder plus, that you have to prove the murder and the plus?

Q And the robbery. We didn't do that in that example, did we? What did we prove? Just murder.

A Just murder, yes.

Q In that case, you find the defendant not guilty of capital murder because we didn't prove capital murder. You find him guilty of what we did prove which was murder. I'm not suggesting that's going to happen in this case or any other case, but it's something we need to discuss. If that were to happen, then you can forget all about—you convict someone of murder, you see, not capital murder, but just murder. The range of penalty is altogether different. Forget about automatic life and forget about automatic death, okay? Instead, the range of penalty for murder is as broad as any offense under the laws of this state, Mr. Wolters.

I like to think, and I think **[3353]** everyone here agrees, that it's as broad as it is to encompass what we talked about earlier and that is the infinite number of situations where one person can commit the offense of murder and all the facts that surround it and make each and every murder a

little bit different and worth of different consideration. Would you agree with me?

A Yes.

Q Like I said earlier, all the law expects of you, as a qualified juror on a murder case, is to, number one—well, it's about three things, really. The first is to follow the law, agree to follow that range of penalty—that's from five years to ninety-nine years or life—and simply tell us that you have an open mind. Obviously you haven't heard any evidence at all, have you? You don't know anything about a murder case to which you could make an intelligent decision?

A Not at this point, no.

Q Just tell us that you're an open-minded person and you will wait. You will listen attentively to all the evidence, all the circumstances, all of the facts surrounding a **[3354]** murder case and after you've heard all of the evidence and then and only then, if you feel that it's proper, warranted, justified and the right thing to do to give the minimum, you will give the minimum whatever it is that the law provides for. The same thing would hold true after you've heard the facts and circumstances of a murder case and you believe that the facts and circumstances warrant, call for, justify and it's the right thing to do and the proper thing to do under those facts, once you've heard them, to give the maximum, you will give the maximum. Can you do that?

A Yes.

Q In other words, no one expects and the law does not expect you to simply right now say, well, I can't think of a case where I would give five years or I can't think of a case where I would give ninety-nine years or life and a $10,000.00 fine. The law does not expect you to be able to think of a case like that, but simply to tell us that, if you see a case and it's a proper case to your way of thinking after you've heard the evidence and you feel it's the right thing to do and the **[3355]** proper thing to do under the law to give five years, you will give five years whether you can think of it now or

not. The same thing if you can think of a ninety-nine year or life case nor or not.

A All right.

Q Am I reading you correctly, Mr. Wolters?

A Yes.

Q Because you're the type of person who is going make a decision based on the evidence and only after you've heard it, right?

A Yes.

Q One of two other matters here and then I'll let the other lawyers talk to you, Sir. Do you understand that the law does put the burden of proof solely on the State and it never shifts over there. He has nothing to prove and nothing to disprove. We have everything to prove. Do you understand that?

A Yes.

Q Mr. Wolters, the law allows a conviction for murder or capital murder on the eyewitness testimony of one individual if you believe that eyewitness beyond a reasonab[illegible]

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[3417] ahead and take care of the other matter. That's semi-urgent, I think; is it not? Ms. Terry, we've got a matter unrelated to this case that Mr. Nelson is involved in and he's going to be the prosecutor who talks to you. If you will bear with us for about five or ten minutes, okay?

(Whereupon, Ms. Terry left the courtroom for a short period of time and then returned to the courtroom and the following proceedings were held.)

THE COURT: I'm sorry to keep you out there in the hall. Ms. Terry, the lawyers have agreed to excuse you in this case. Both sides agreed which I approve because, everything considered, it's probably the best way to handle it. I thank you for your attendance down here today and for your apparent willingness to

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[3433] CHERYL A. DAVIS,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Good morning, Ms. Davis. How are you this morning?

A Fine.

Q Good. As I was introduced to you on Monday, my name is Jim Nelson. I'm going to be talking with you for the next few minutes about some things. I want to start out by reintroducing everybody else who is here. The gentleman sitting next to me is Paul Macaluso. As you were told on, Monday, I think, a third person will be involved for the State and his name is Norman Kinne. He will be presenting the evidence for the State of Texas in this case. He's not down here today, but you will see him when the trial starts.

The man seated to my left is Mr. E. Brice Cunningham.

MR. CUNNINGHAM: Good **[3434]** morning, Ms. Davis.

Q He will be joined at some point this morning by Royce West. Mr. Cunningham and Mr. West have been appointed by Judge McDowell to handle the defense for the man at the far end of the table, Thomas Joe Miller-El.

DEFENDANT: Good morning.

Q Thomas Joe Miller-El is charged with and has been indicted with the offense of capital murder, the most serious offense that can be charged in the State of Texas. What we're going to do for the next few minutes is talk to you a little bit about some of the things that may be involved in this case and in the trial itself and some of your feelings about things.

I glanced over your questionnaire. I don't remember you being on jury service before; is that right?

A This is my first time.

Q Well, as Royce West is fond of saying, you hit the jackpot. Most people come down here expecting to sit on a civil case or a shoplifting or something like that, but you hit the big time with this one. **[3435]**

Normally in criminal jury selection you would be seated in a group with forty or fifty people kind of like you were on Monday and the lawyers would talk to you like the Judge did as a group. Because this is such a serious case and there are issues that people feel very strongly about both ways, the law allows us to talk to you individually. The hope is, by talking to you individually, you will feel a little bit more comfortable and it will be a little bit easier for you to talk to us. I know, if I'm in front of a group of forty or fifty people, I'm going to start worrying about how I sound and how I look and if my tie is straight and all kinds of stuff. We just want you here to relax as much as you can and visit with us a little bit. We're going to try to find out how you feel about some things and that's what really counts here today, is your feelings. We want to find the twelve people best suited to serve on this kind of case.

We've been working on this for four weeks. You're juror number eighty-two. We have seven who have been sworn to serve on **[3436]** the jury at this point. You can see that it is rather tedious and it takes a lot of time and I hope you will be patient with us as we go through it.

Let me just start out by asking you if you know any of us who are sitting here or who are going to be involved in the trial?

A Never seen you before Monday.

Q Okay. I'm going to start out, Ms. Davis,, by telling you what our position is. The State of Texas in this case is actively seeking the death penalty for Thomas Joe Miller-El. We've been telling the jurors that for four weeks now and we're going to continue doing that until the trial is over. We feel like we can present to a jury the type and quality of evidence to convince them beyond a reasonable doubt that

Thomas Joe Miller-El is guilty of capital murder and we feel like we can present sufficient evidence and the quality of evidence to convince you to answer three questions yes. If those three questions are answered yes, Judge McDowell has absolutely no choice but to assess the death penalty in this case. That's the death penalty for that man **[3437]** sitting right down there.

That's basically our position. I feel like it is only fair that you know that going in because that's what you're going to hear from now on. What really counts is how you feel and your position on things. You had a chance to fill out a questionnaire on Monday. A lot of people have told us that when they got these questionnaires, they hadn't quite gotten over the shock of finding out this was a capital murder case that they were on.

One of the questions, number fifty-six, is about the death penalty and your feelings about the death penalty. I'd like you, if you would, to just tell us in your own words, first of all, how you feel about the death penalty and whether it serves a purpose in our society or not and, secondly, whether you feel like you could serve on this type of jury, this type of case?

A I've always felt in the past that I wouldn't have any trouble -- you know, I've never been confronted with having to do it before, but I honestly think, if there wasn't a doubt that someone was guilty of murder, I **[3438]** think I could do it. You always say, you know, sure, but I've never been confronted with it. I don't know exactly how to reply. I think I could if there wasn't a reasonable doubt.

Q Can you think of any reason why you couldn't serve?

A I really can't.

Q You put on the questionnaire, do you believe in the death penalty, and you circled yes?

A Yes.

Q Okay. Do you feel like it serves a purpose in our society?

A Certainly.

Q How would you put that? What purpose?

A I know very little about the judicial system, but it seems as though --well, just from what I've read, that people get out of jail for things that they have done and to put them back on the streets, which is always the chance, I don't think it's right. I don't think; if they actually killed somebody and the chances are that they could do it again, they should be released. I really feel **[3439]** an eye for an eye.

Q That's the way some people have put it that have talked to us. How long have you felt this way, Ms. Davis?

A I don't remember. As I say, I've never been confronted with having to discuss it with anybody, but I feel like I've felt this way -

Q You've never been against the death penalty?

A No.

Q You're married; is that right?

A Yes.

Q Do you know how your husband feels about the death penalty?

A I believe he feels the same way. It's not something we've talked about.

4 I understand that it's not something that comes up regularly at the dinner table, but you think he feels about the same way you do?

A Yes.

Q You've said that you feel the death penalty is appropriate for certain types of murder; is that right? **[3440]**

A That's right.

Q Are there any other types of crimes or any other types of cases that you feel the death penalty might be considered if it were up to you?

A I think that murder would be - like rape or anything like that, I don't feel should have the death penalty.

Q Let me tell you a little bit about what the law is in Texas. In Texas there are, I guess, two categories of murder. There's murder and there's capital murder which is murder under certain circumstances, under certain situations. Now, murder, the knowing or intentional taking of another person's, life is not a capital offense. The death penalty is not available, for lack of a better word, for just murder. It has to be capital murder. There are about four categories of capital murder. One of those is killing a certain class of persons like a police officer or a fireman on duty, a prison guard, something like that. The second category is murder for hire. If I hired Mr. Macaluso to kill someone and he did it, we could both be prosecuted for capital **[3441]** murder. The third that is new just this year is mass murder. You may have heard about the Ianni's incident a couple of years ago. That now could be capital murder under the new law. The last kind is the kind that we're dealing with here. We call it murder plus. I think the Judge mentioned that on Monday, murder plus another offense, for example, murder in the course of a burglary or in the course of an arson or a rape or a kidnapping.

What we're dealing with in this case is murder in the course of a robbery. Basically what our indictment that has been returned by the Dallas County Grand Jury says is that Thomas Joe Miller-El did knowingly or intentionally cause the death of Douglas Walker and did it while in the course of committing or attempting to commit a robbery. That's capital murder under the laws of the State of Texas. Do you have any problem with those offenses having the death penalty as an option?

A No.

Q Okay. Would you add to that, add to those offenses or change that in any way?

A I'm not sure that I understand **[3442]** why -- are we talking like someone has premeditated, wanted to murder someone, capital punishment is not?

Q Not necessarily.

A You see, I don't think I fully understand what the difference is. To me that would seem it should have the same charges as a robbery or something like that.

Q The legislature has decided that murder, the knowing or intentional killing of another person, is not subject to the death penalty in Texas. Everybody has their personal

feelings about that. I know laws that I don't agree with. I get out in West Texas and they tell me to drive fifty-five when you can see eighty miles in every direction, I have a little problem with that. In another month and half, I'm going to have a problem with some federal IRS laws also, I think, but I follow the law like everybody does.

Let me just stop right here because I just got the two new names. They're Jacob Hernandez and Homer Hernandez. Do you anybody by either of those names?

A No.

[3443] Q Okay. Back to what I was talking about. Whether I agree with the law or disagree with the law, I follow the law because that's the law. The Texas legislature has decided that capital punishment is not proper for regular murder. It gives a very wide range of punishment for murder. It's anywhere from five years up to ninety-nine years or life and up to a $10,000.00 fine. We'll talk about that some more in a few minutes. But they've given that wide range because there are so many different circumstances in which murder can occur.

When I say murder, I'm talking about the knowing or intentional killing of another human being. We're aren't talking about self-defense. We aren't talking about an accident or someone who was insane or a killing in the heat of passion or something like that. We're talking about killing someone. I think if we sat here for the next four or five hours, we could come up with hundreds of different situations in which murders can occur. It's still murder, but there may be all kinds of things that enter into it.

[3444] People could have been fighting or the prior relationship between the parties you can consider. The circum-

stances surrounding the murder, you can consider. There are all kinds of things that go into that. The legislature has decided that the death penalty is not proper for that. They have restricted it to these specialized categories. What we're going to have to ask you to do is to understand that that is the law and tell us whether you can follow that law or not?

A I think I can.

4 Okay. Even though your personal beliefs are a little bit different. We have people come down here and say, well, for a bad sex abuse of a child case or a bad rape case 'or something I'd like to see the death penalty, but I know what the law is and I could follow the law and there's no problem with that. We have our personal opinions on things, but the legislature has decided this is the way it is and those are the rules we have to abide by. Do you have any problem with that?

A I don't think so. It makes sense.

Q Okay. Now, you talked a little **[3445]** bit about premeditated murder. In Texas we're not required to prove, in a murder case or a capital murder case, either one, premeditation or motive. The law does not require us to prove either one of those things. You may hear evidence on them and we may prove them, but we aren't required to.

Here's basically what we're required to prove, Ms. Davis, and it's this: That Thomas Joe Miller-El on or about a certain date in Dallas County, Texas did knowingly or intentionally cause the death of Douglas Walker, an individual, by shooting him with a firearm and the Defendant did cause the death of Douglas Walker while the Defendant was in the course of committing or attempting to commit the offense of robbery. That's what we have to prove under the law for you to find him guilty of capital murder and that's all we have to prove.

You notice that there is nothing in there about motive. There's nothing in there are premeditation. Now, let me ask you this because we've had this come up before and we've gotten in a little -- premeditation may **[3446]** mean one thing

to me and something different to you. Why don't you tell me what you mean by premeditation?

A Preplanned, that he had the intention of doing this before he left the house, that he left to do this.

Q Okay. Would you require us to prove that to you before you convicted someone of murder or capital murder?

A These are real hard questions. I've never had to even think about anything like this. If it's not a law and you're not required to prove it, I can't see how.

Q Let me go into this a little deeper. We have to prove that the person did this knowingly or intentionally. In other words, it's not an accident. Can you see how someone could decide to do something days or hours ahead of time or someone could decide to kill another person minutes before he does it or someone could even decide to kill another person just moments before he actually does the killing and still intend to kill them or knowingly kill them? Am I making myself clear about that?

[3447] A Yes.

Q Okay. Now, when you talk about premeditation, you're talking that they planned to. do it, you said, before they leave the house. That's fine. If you feel that way, that's fine, but we just need to find out because, if you're going to require that of us, then you're requiring us to do something that the law doesn't require us to do.

A I believe I understand the difference in what you're saying.

Q Okay. Are you going to require us to prove that it was premeditated or, if we show you that it was knowing or intentional, will that be sufficient?

A Yes.

Q Okay. Any question about that?

A No.

Q Now, we were talking a few minutes ago about the range of penalty for murder. I told you it's anywhere from five years up to ninety-nine years or life and a $10,000.00

fine. Again, we're talking about murder, not capital murder.

Say, for example -- in this case we have a murder in the course of a **[3448]** robbery. Let's pick something different. Let's say we have a murder in the course of a burglary.

A I don't know the difference between a burglary and a robbery.

Q Okay. A burglary is if you break into somebody's house and steal something and they aren't there. That's the burglary of a house. We call it burglary of a habitation in Texas. Let's say we have a murder in the course of a burglary. They burglarize the house and kill somebody. We put evidence on and we prove to you that he knowingly or intentionally killed this person, but you don't hear any evidence at all about a burglary, nothing. We haven't proved capital murder then, have we? All we've proved is murder because we haven't proved the plus. Remember that it has to be murder plus?

A Yes.

Q Okay. We haven't proved the plus, so all we've proved to you is murder. That's where the other range of punishment comes in. We talked about murder as the knowing or intentional taking of another human life **[3449]** without any legal justification or without any legal excuse. Again, it's not self-defense. It's not an accident. It's not insanity and it's not a killing in the heat of passion. If I find out somebody raped my four year old daughter and was standing two houses down laughing about it and I went down and killed him, that would be killing in the heat of passion.

It's still a killing, but it's voluntary manslaughter. It's not murder. We're talking about murder. Are we clear on that?

A Yes.

Q The law says that the range of punishment is from five to ninety-nine or life and every juror, to be qualified, has to be able to consider that entire range of punishment. By consider I don't mean you have to tell us right now you will give five years and you don't have to tell us right now that

you will give life or you will give sixty-two years because you haven't heard any of the facts. You don't know what the facts are and we can't tell you at this point what the facts are. We can't even give you examples of facts. **[3450]** All you have to be able to tell me and Mr. Cunningham and the Judge is, you will keep an open mind. You will listen to all the facts and circumstances. You will listen to all the evidence and after you've heard all that evidence, you will make a decision. Do you have any problem with that?

A No.

Q Okay. You have to be able to tell us that, after you've heard all the facts and circumstances, everything you're going to hear about the offense itself, the crime itself, and about the person who committed the crime, if you believe in your own mind that a life sentence is called for would you give it? The other end is, if you believed after you've heard all the facts and circumstances and you know everything about the case and about the defendant that you're ever going to know, if you're convinced in your mind that five years is appropriate for this case, could you give that?

A Yes.

Q You don't even have to be able to sit there right now, Ms. Davis, and say -- and **[3451]** think in your own mind of a case that would justify five years or a case that would justify life. You just have to tell us, if you hear that case maybe sixty years from now, you hear that one in a million case and you say, I never thought I'd hear it, but here it is, a case that calls for five years, you'll give it. I'll give five years. The same thing for the life sentence, I never thought I'd hear it, but this is it. These facts call for a life sentence and I'll give it. Do you have any problem with that?

A No, and I believe I could.

Q You believe, if the facts called for five years, you could give it and, if the facts called for ninety-nine years or life, you could give it?

A I do.

Q Let me mention one other thing while we're talking about it. There's been a law passed by the legislature that you may or may not know about that relates to parole and good time. It basically says it is possible that a defendant sentenced to a term of imprisonment may earn time off his sentence **[3452]** imposed with the aware of good conduct time. It also says that it's possible that the length of time for which a defendant will be in prison might be reduced by the aware of parole. It cannot accurately be predicted how the parole law and good conduct time might be applied to this Defendant if he is sentenced to a term of imprisonment because the application of these laws depend on decisions made by the prison and parole authorities. In other words, you don't know what's going to happen and you don't have any control over what is going to happen. It's up to the Board of Pardons and Paroles and the governor of the State of Texas. You don't have any control. I don't have any control. None of us do.

The law goes on to say, you are not to consider the extent to which good conduct time may be awarded to or forfeited by this particular Defendant and you are not to consider the manner in which the parole law may be applied in this case. What they do, Ms. Davis, is they tell you that it's there, good conduct time and parole is there, and then they tell you that you can't consider it and you **[3453]** can't adjust the sentence one way or the other because of that. They want you to know it's there, but it can't enter into your deliberations when you're deciding what the punishment is. Do you have any problem with that?

A It would be hard not to have it - I mean, honestly, thinking that if you gave him a certain amount of time and you knew they would get out with good behavior. It would be hard not to consider it, but I can see where -

Q That's where -- when we talked before about what the laws are you know what the laws are -- that's a fire alarm going off.

A Should we leave?

Q If I left every time that thing went off, I would never get any work one. That's another situation where you just have to discipline yourself to say, okay, I know it's there, but I know I can't consider it, so I'm not going to. Again, if you hear that five year case, you will give five years. If you hear the life case, you will give life or sixty years or twenty-five or whatever it is. Do you feel like you can do that? **[3454]**

A I think I could, yes.

Q I understand that all of this is new and you haven't done it before, but I'm sure if you tell us you can do it, you will do it and that's all we ask.

A I feel like I'm an honest person. I don't think that I would -

Q Okay. Good. That's all we're asking. Let me go just a little bit more into capital murder now. I told you what we have to prove in that indictment to prove capital murder. That's done during the first phase of the trial, what we call the guilt or innocence phase. We have to prove that beyond a reasonable doubt. We have to prove it. Mr. Kinne, Mr. Macaluso and myself have to prove it. The defense never has to prove anything. The Defendant sitting right down there right now is presumed to be innocent. If you had to decide on a verdict right now, it would have to be not guilty, not because he didn't do it, but because we haven't proved it yet and it's our duty to prove it beyond a reasonable doubt. They can sit there and we could not hear a peep out of them for the whole trial, but if we **[3455]** don't prove to you everything in that indictment beyond a reasonable doubt, it's your duty to find him not guilty. Do you have any problem with that?

A No. It would have to be proven.

Q Now, part of that is, the Defendant does not have to testify if he doesn't want to. If he chooses not to testify, you can't consider that. You can't discuss it and you can't even think about it. It just flat cannot come up in your jury deliberations. That's another one of those things. It's there, but

you just can't consider it. Do you have any problem with that?

A No.

Q There could be a hundred reasons why he doesn't testify. Someone may have a hair-lip or they may not be able to speak well or they may get tongue-tied when they're in front of people. It doesn't mean they're guilty. They just can't testify for one reason or another.

Now, if he is found guilty of capital murder, we prove our case beyond a reasonable doubt, then we go to what is called **[3456]** the punishment phase of the trial. It is at that stage that the decision either life or death. Those are the only two options for capital murder. It's a life sentence just like any other life sentence in the State of Texas and subject to the same rules and regulations or the death sentence.

Under the old law the jury made that decision directly. They listened to the evidence, go out, and after they decided, write on the jury form either life or death and signed it and that was it. Now, the legislature has made things a little bit different. They ask you to answer questions instead. The three questions on the board are the ones that would be submitted to you. Why don't you take just a minute and read those over.

A (Juror complies.)

Q Have you had a chance to read those?

A Uh-huh.

Q Those three questions are the same in every capital murder case tried in the State of Texas. They aren't unique to this case. **[3457]** The jury is going to have to answer those based on the evidence and we have to prove to you, based on the evidence, that those questions should be answered yes. If we don't, you have to answer them no. Again, you may not hear a peep out of them, but if we don't prove that those three questions should be answered yes, you have to answer them no. Do you have any problem with that?

A No.

Q All right. If you answer all three of them yes, again Judge McDowell must sentence this Defendant to death. He has no options. Whether he agrees or disagrees or thinks that's too strong or too weak or whatever, he has no option but to sentence him to death. The jury makes the decision. By the same token if one of those questions or more than one is answered no, he must sentence the Defendant to a life sentence whether he agrees or disagrees. Even though you're not writing life or death any more, the decision is the . same and the effect is the same. Are you with me on that?

A Uh-huh. **[3458]**

Q Let's look at the questions. The first one is fairly straight forward. "Was the conduct of the Defendant that caused the death of the deceased committed deliberately and with the reasonable expectation that the death of the deceased or another would result?" Can you see how, after hearing the facts of this case, of this crime, you could answer that question either yes or not?

A Sure.

Q Okay. If he intended to do it, then that's going to be answered yes. If he didn't, it was an accident or something strange happened where -- like if I shot Mr. Macaluso in the foot and the bullet bounced off the wall and the ceiling and came down and killed him, then that might be answered no. Let's look at number two. "Is there a probability that the Defendant would commit criminal acts of violence that would constitute a continuing threat to society?" What do you feel like they're asking for there?

A He would do it again if he didn't get charged with it.

MR. CUNNINGHAM: I didn't **[3459]** hear the last part.

A If he would do it again if he was not convicted.

MR. CUNNINGHAM: If he was not what?

MS. DAVIS: Convicted.

Q Would you agree with me that probably an important word in that is probability?

A Right.

Q What does probability mean to you, Ms. Davis?

A That there's a chance that it would happen again.

Q Okay. It also talks about criminal acts of violence. Now, that can be murder or it can be other things, too, couldn't it?

A Sure.

Q Like a rape or a robbery, if I took a baseball bat and beat Mr. Macaluso over the head with it, that would be a criminal act of violence, wouldn't it?

A Certainly.

Q So if there is a chance that he **[3460]** would commit a criminal act of violence in the future, then that question would be answered yes. Can you see how that could be answered either yes or no based on the evidence?

A Sure.

Q Is there some important type of evidence that you would like to hear, something you would like to know before you answered that question?

A Right now?

Q After you've heard the case. He's been found guilty of capital murder. What would you like to know to answer that question?

A More about his history. More about prior times.

Q Okay. Can you see how you might be able to answer that from the facts of the case itself; for example, what happened before the crime, was it planned, was he involved in the planning or was it a spur of the moment thing? During the crime was the defendant a leader, was he giving orders or was he kind of on the edge of things? Could he have done something short of killing this person? Afterward did the defendant feel any remorse, **[3461]** did he feel sorry about what happened or was it just another day at the office kind of thing? Do you see how you might be able to answer that question from knowing those facts?

A Certainly.

Q The third question you may or you may not get depending on the evidence. Basically what that asks, Ms. Davis, if it was a provoked killing, if the person who was killed did anything to provoke the killing. If it was an unprovoked killing, that question would be answered yes. Would you agree with me on that?

A Yes.

Q And if he did do something to provoke it, then you're going to have to make a decision, whether the killing was reasonable or unreasonable in response to the provocation, okay?

A Okay.

Q Those are the questions. What we're going to ask you to do is to listen to the evidence and keep an open mind until you've heard all of the evidence and then answer those questions either yes or no based on the **[3462]** evidence. Do you feel like you can do that?

A Uh-huh.

Q If we prove to you that they should be answered yes, then you can answer them yes?

A Yes.

Q If we fail to prove that to you, if we don't carry our burden of proof, you can answer them no; is that right?

A I believe so.

Q You're going to make us prove our case, make us carry our burden?

A Yes. This is important.

Q Okay. Ms. Davis, I'm about out of time. Judge McDowell has been very gracious in giving me an extra couple of minutes for us to talk. Let me mention just about two other things real quickly. The Judge talked to you about one eyewitness on Monday morning. Can you base a verdict on the testimony of only one eyewitness? If you believe that person beyond a reasonable doubt as to everything in the indictment, can you find the Defendant guilty?

A I think so, yes.

Q If you don't believe that person **[3463]** as to everything in the indictment, can you find the Defendant not guilty?

A Yes.

Q A little further on that, the credibility of witnesses. As people testify, I like to put it as kind of a race. Everybody starts out at the starting line, the same point. As people testify and you listen to them, some may pull ahead, some may fall back, some are more believable and some are less believable. You have to start them all out at the same point. You can't believe someone just because they're a police officer or just because they're a minister or a priest. You can't disbelieve someone just because they dig ditches for a living or something like that. Can you listen to everybody and give them the same hearing or the same -- judge them all on the same basis?

A I believe so.

Q And not believe somebody just because they do something or disbelieve them because they do something?

A I believe so.

Q Okay. Ms. Davis, I'm going to **[3464]** quit talking to you. I appreciate your time very much and I appreciate your being open with us. Are you telling us that you will keep an open mind and listen to all of the evidence before you make a decision on the guilty or innocence and do the same thing on the punishment phase?

A Yes.

Q Are you telling us that you can set your personal feelings that don't necessarily agree with the law, set those aside, and follow the law, whatever the Judge tells you to do, you'll do it?

A I believe I can, yes.

Q That's all we're asking. If the Judge tells you that this is the way things are and this is what you have to do, that you can't consider the Defendant's failure to testify and you have to presume him innocent and we have to prove the

case beyond a reasonable doubt, all that stuff, whatever the Judge tells you, you can follow that; is that right?

A Yes.

Q Ms. Davis, I thank you very much for being patient with me in answering my **[3465]** questions. I enjoyed talking with you. Can you think of any reason that you could not be a fair and impartial juror to both sides in this case?

A No, and I have thought about it, too.

MR. NELSON: Judge, we'll pass the juror.

* * * *

[3469] A That I read the book?

Q Yes.

A About a year ago.

Q I believe you told Mr. Nelson the reason that you believe in the death penalty was because people get out of jail and do the same thing again?

A That would have a bearing on it, certainly. I certainly don't know the limitations of the law, but reading the paper, watching TV and that sort of thing. It just seems like a lot of people do bad things and don't have to pay for them. They get right back out and do it again.

Q That's why you believe, if a person kills another person without any legal justification or any legal excuse, that person should receive the death penalty?

A That's one of the reasons, yes.

Q And you would never vote for five years for a knowingly and intentionally taking of another person's life?

A I don't believe I could.

Q You mentioned on your information sheet that your spouse had been charged with **[3470]** theft?

A Yes, sir.

Q Has that case been disposed of?

A He got probation and was off probation in '83.

Q I'm sorry?

A He got seven years probation and it was off in '83.

Q Was that here in Dallas?

A Yes, sir.

Q And you say he completed his probation in 1983?

A Uh-huh.

Q Do you remember whose court that was in?

A Judge Scales?

Q The 195th. You don't hold any grudge against the police or the district attorney's office or anybody else?

A No, sir.

Q You could be fair to both sides?

A I believe so.

Q Mr. Nelson told you, and it is true, that in Texas the State does not have to prove premeditation. They do not have to prove

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[3503] GARY D. SPENCE,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows;

EXAMINATION

BY MR. MACALUSO:

Q Good afternoon, Mr. Spence. Let me begin by reintroducing most of the people who will be involved in this case. I'm Paul Macaluso and to my immediate left is Jim Nelson.

MR. NELSON: Good afternoon.

Q Mr. Spence, once the trial actually begins, we'll be joined by another lawyer. His name is Norman Kinne and he's not here, of course, right now. Mr. Kinne, Jim Nelson and myself are assistant criminal district attorneys here in Dallas. We work for Henry Wade who is the district attorney, I'm sure you know. He's designated us as the lawyers to represent the State of Texas in this particular case.

Now, to Jim's immediate left is Mr. Brice Cunningham.

MR. CUNNINGHAM: How are you Mr. Spence.

* * * *

[3508] enough?

A Fair enough.

Q Okay. Let me tell you what our position is, Mr. Spence, from the very outset, that is the position of the State of Texas relative to this particular case and this Defendant. Mr. Spence, we are actively seeking the death penalty in this case for Thomas Joe Miller-El. Now, we know that the law allows for it under the proper facts. We know what the law is and we know that the law allows for it and we intend to provide this jury—we have seven jurors now and we need five more. We intend to provide this jury, once it is selected, with the type and the quality of evidence that will convince them beyond any reasonable doubt whatsoever that Thomas Joe Miller-El is guilty of the offense of capital murder just exactly as he's charged in this indictment.

Then in the second phase of the trial where the penalty is actually determined, whether it be death or life, we intend to be able to provide that same jury with the type as well as the quality of evidence that will convince them beyond any reasonable doubt whatsoever that [3509] those three questions should be answered yes. You know the result of three yes answers or all yes answers is a mandatory sentence of death. Do you see what I'm getting at?

A You're talking about these questions?

Q Yes, sir. Now, I'm just telling you what our position is just as we've told—you're number eighty-five and we've told every other prospective juror that we've talked to the same thing just to put the juror on notice of exactly what we intend to prove based on the evidence so it will come as no surprise what our position is at the close of the evidence. Do you see what I'm getting at?

A Yes.

Q Now, ultimately what our position is doesn't really matter. Do you understand that? What really matters is the decision that will be made ultimately by people like yourself if you're on this jury. Now, Mr. Spence, what we're looking for, of course, ultimately are the twelve people that both sides feel are the most fair and the most impartial; in other words, the best suited to listen to the facts of this case **[3510]** and make certain, as you can see, very, very, very important decisions. So that's what we want to talk to you about and get your feelings and impressions about.

Now, what we're looking for, of course, is the type of juror who, number one, will follow the law with regard to the law that will come into play in this case and certainly follow their oath as a juror which would require them, as you did in that last case, to render a true verdict according to the law and then according to the evidence. Is there something that you want to say there?

A No, sir. I agree.

Q Now, let me just—I've done quite a little talking here myself and the object of it all is to get you to talk ultimately, to see how you feel about things so we get a little fix on you. Let me just ask you, Mr. Spence: I know you were asked this question, number fifty-six, about how you feel about the death penalty and we only give you three lines there and you weren't given a great deal of time to ponder it. You've had three or four days now to mull it over in your mind. Let me just ask you if you would **[3511]** share with us, sir, your personal feelings about the death penalty and capital punishment. In other words, how do you feel about it and then, secondly, if you feel you would be able to serve on this type of a case and actually render a decision that would result in the execution of another individual?

A I feel that there are crimes that warrant death, sometimes would. As far as being able to serve on this jury, I believe ultimately I feel—I have to tell you up front that it probably wouldn't be an easy thing for me to do.

Q I understand that.

A But I understand that the law provides for such penalties in some cases and I believe in my heart that they're justified in some cases. Yes, I believe I could serve on it.

Q Your feelings about the death penalty, do you feel that the death penalty serves a particular purpose in our society?

A I think it serves two purposes. I believe one, it's a just penalty for some crimes and it shows others, who might be thinking of doing the same thing, what could happen to them.

Q What sorts of crimes comes to your

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[3525] A Okay. I understand what you're talking about. That's where the—

Q That's where the range of penalty comes in.

A It's not the range of the offense?

Q No.

A It's the range of penalty.

Q Now, the law says for murder, if a person is convicted of murder, the range of penalty is from five years in the penitentiary all the way up to ninety-nine years or life. Like I said earlier, Mr. Spence, all the law requires for you to be a qualified juror on a murder case—we're talking about murder now—is that you, number one, tell us you will be able to follow the law. Can you do that?

A Yes, sir.

Q You followed the law in the rape case, didn't you?

A Yes, I did.

Q All right. The second part of it is, that you will keep an open mind. You will listen to all of the evidence, if you were a juror on a murder case, and wait until you've

[3526] heard every last bit of evidence before you decide what the proper penalty ought to be. Fair enough?

A That's fair enough.

Q Okay. I mean, you're not the type of person, are you, sir, who will prejudge anything before you've heard all the evidence, are you?

A Not knowingly.

Q What I'm getting at is, when you make decisions, certainly important decisions, I gather you, like everybody else, are going to want to hear all of the facts before you make a decision?

A I believe in a case like this, I would want to hear all the facts.

Q And the law expects that a qualified juror will just keep an open mind, wait until you've heard all of the facts. Certainly you've heard no facts about any murder case yet, have you? You've heard no evidence?

A No, sir.

Q All right. Number one, you will follow the law, you will keep an open mind, [3527] isn't that right, and wait until you've heard all of the fact and then decide, after you've heard all the facts in a murder case, what you, Mr. Spence, feel is the proper sentence for the fact situation surrounding this murder. Am I making myself clear?

A Yes.

Q All right. In other words, if you hear a fact situation to your way of thinking, only after you've heard all of the evidence, that you feel calls for the—calls for it or warrants it and justifies the maximum, you will give the maximum, if you feel that's the right thing and the proper thing to do? Fair enough?

A Right.

Q On the other hand, after listening to the evidence in a murder case, wait until you've heard every last stick of evidence, if you feel it is warranted, justified and calls for—in

in other words, it's the right and proper thing to do give the minimum, you will give the minimum? Fair enough?

A Right.

Q In other words, it's like the old cliché, you tailor the punishment to fit the [3528] crime, but you can't tailor any punishment until you hear the facts about the crime, can you?

A No.

Q And you haven't heard anything yet, have you?

A No.

Q Now, there are a couple of important things I want to discuss with you in that regard. As you sit there now, Mr. Spence, the law does not expect you to be able to think in your own mind of a fact situation or, in other words, a murder where you would say, yeah, I could give ninety-years or life and a $10,000.00 fine for this situation that I've got in my mind. Do you see? The law doesn't expect you to think of a situation like that. The law, likewise, does not expect you to be able to sit there and think of a situation where, yeah, I've got a situation in my mind where I could give as low as five years for murder. Do you see? The law doesn't expect you to do that.

All the law requires and expects of you is this, what I said before, to keep an [3529] open mind and don't prejudge anything because you haven't heard any facts yet. Wait until you have heard all of the evidence and then, if you see a case that calls for, warrants and justifies the maximum, you give that. If you see a case to your way of thinking where it is proper to give, under the facts, the minimum, tell us that you would be able to actually consider and vote for the minimum. Can you do that?

A Yes.

Q Now, you understand that it may be difficult to give either the maximum or the minimum. It might take real special facts. Can you agree?

A Yes.

Q In other words, you're going to have to hear something real bad before you give the maximum; would that be fair to say?

A Yes.

Q And you would probably have to hear some real special facts before you would give the minimum. Do you see what I'm getting at?

A Right.

[3530] Q It may be a rare occasion where you would give either the maximum or the minimum. You feel that you ought to set the punishment somewhere in between and the law allows you to do that. If you want to give seven years, ten years, twenty-five years, fifty years, you could give that, too. Do you see what I'm getting at?

A Yes, but I've got one question.

Q Sure.

A Didn't you tell me a while ago there are only two that you could—this particular case has?

Q No. We're just talking about murder. We're not talking about capital murder. We'll talk about that in just a second. When we're talking about murder, it's from five years all the way up to ninety-nine years or life or anywhere in between. Now, what it boils down to is this, Mr. Spence:

Do you feel you're the type of open-minded person who will follow the law and, if you hear a fact situation in a murder case that you feel warrants, justifies and calls for the maximum—and you know that's ninety-nine **[3531]** years or life. If you feel it's proper after you've heard the evidence, could you return a verdict of ninety-nine years or life for murder?

A Yes, I could.

Q All right. Do you see the other side? Are you the type of person who is fair-minded and open-minded and can follow the law and, if you heard a fact situation that, once you've heard all of the evidence, calls for, warrants and justifies the minimum of five years in the Texas Department of

Corrections because you feel it's the right thing and the proper thing to do after you've heard the evidence, could you do that as well?

A Five years doesn't seem right to me for murder.

Q All right. Now, let's cover that for just a second. No one is saying you have to give five years in every murder case. No one is saying you will ever necessarily give five years in a murder case. Mr. Spence, theoretically you could be on a hundred different murder cases and never give one. For example, never hear facts that satisfy you that **[3532]** you should ever give ninety-nine years or life because you just don't ever hear the type of facts that you feel are proper for ninety-nine years or life; would you agree with me?

A I agree.

Q You know, you just may never hear—you may hear some that call for fifty years. You may hear some that call for twenty years and you may hear some that you think call for seventy-five, but you may never hear, if you're on a hundred cases—all you have to do to be qualified is tell us, if you hear a case, whether you can think of it now or not, you're the type of person who is open-minded enough to say, well, I'm not saying what I will do, but if I hear a case that I think calls for life or ninety-nine years and a $10,000.00 fine, I'll give it. I believe you said you could do that; is that right?

A I could do that.

Q They may be few and far between, would you agree with me?

A Yeah, I agree with you. I think I could do that if it warrants it.

Q Right. The same thing would hold **[3533]** true of the minimum. The type of case and the type of facts in a murder that may call for five years may be few and far between, would you agree with me in that regard?

A I think it would be. I can't think of anything right now.

Q That's the whole thing. Don't be thinking of it. All you have to do is to be able to tell us this: If you, that is Mr. Spence, heard a fact situation where you think it's the right thing to do, whether you can think of it now, if you think after you've heard the facts of the case—you say, I never thought I'd see it. I never thought I'd see it, but here they are. These facts, to me, call for the minimum. If the minimum is five years, even though I never thought I'd see it, this is the case, one in a million, one in a hundred, one in fifty—but if you see it and you think it's justified, would you return a sentence of five years?

A If I thought it was justified, I would if that's following the law.

Q That's right and that's all the law is asking. That's all we're asking, that **[3534]** you follow the law and just tell us you have an open mind and you haven't closed your mind, have you?

A No, I haven't.

Q You haven't said—

A No, I haven't done that, but something would have to be justified in my mind.

Q Of course, and so would a ninety-nine year or life sentence, wouldn't it?

A Yes.

Q And a fifty year sentence would have to be justified, too, wouldn't it?

A Right.

Q Or a twenty-five year sentence?

A Yes.

Q In other words, either extreme I think everyone would agree that it would take special facts and you're not going to see them in every case?

A I wouldn't think so.

Q But if you see a five year case, you would vote for five years, wouldn't you?

A If I saw it.

Q You haven't closed your mind to **[3535]** that possibility, have you?

A No.

Q It may be a tough case to warrant five years, but if you see it, you'll give it, won't you?

A If I see it.

Q If you see a case that calls for ninety-nine years or life, you'll give that as well?

A If I see it.

Q Now, while we're on the subject of murder, let's talk about one other thing here. The instructions that the Judge will actually give you to govern your deliberations, he will probably talk to you about the laws of parole. Everyone knows that people are paroled or eligible for parole under certain conditions for any type of an offense sooner or later.

This is kind of an unusual situation, Mr. Spence, but basically what happens here is, the law actually tells you about that any sentence that is assessed in any type of case basically and in a murder case certainly is subject to the law of parole. The Judge would actually give you instructions that

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[3666] MILDRED C. PINCUS,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Good morning, Ms. Pincus. As I was introduced to you yesterday, my name is Jim Nelson. The gentleman who is going to be in here in just a minute is Mr. Paul Macaluso and I think the Judge told you yesterday a third person who will be involved for the State of Texas is Mr. Norman Kinne. The three of us are assistant district attorneys here in Dallas

and we've been assigned by Henry Wade, the elected district attorney, to handle this case for the State.

Seated next to me is Mr. E. Brice Cunningham.

MR. CUNNINGHAM: Good morning.

Q He will probably be joined at some point by Mr. Royce West. Those two gentlemen are attorneys in Dallas who have been appointed

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[3669] The first thing I would like to ask you is, if you know any of the people in the courtroom or anyone else I've named, either personally or by reputation?

A No, sir.

Q Okay. Ms. Pincus, I feel like it is only fair to you that you understand our position in this trial, the position of the State of Texas. We are actively seeking the death penalty for that man sitting right down there, Thomas Joe Miller-El. We feel like we will be able to present to a jury of twelve people the type and the quality of evidence that will allow them to convict him of the offense of capital murder and the type and quality of evidence that will allow the jury to answer three questions yes. If those three questions are answered yes, Judge McDowell has absolutely no choice but to sentence that man sitting down at the end of the counsel table to die. That's all there is to it. He has no options. Whether he agrees or disagrees with the jury's verdict, the jury's verdict is the final say.

We anticipate at some point that **[3670]** sentence, if the evidence comes out as we expect it to, will be carried out and Thomas Joe Miller-El will die as a result of the verdict in this case.

Now, you had a chance yesterday to fill out a questionnaire. It was rather lengthy and you didn't have a whole lot of time to think about it and I know you had other things on your mind at the same time. You've had a chance overnight now to think about it a little bit more, so I would like to ask you, if you would, to tell us in your own words how you feel

about the death penalty and secondly how you feel about your ability to sit as a juror on this type of case?

A Well, I've always felt like—there are a lot of instances where I feel like the death penalty is warranted. Not all that are asked for, do I feel like are, but I feel like there are a lot of them that are sitting there on death row right now that should have been executed. I really do because I feel like all the avenues that are available to any of us in that situation have been exhausted. There are some crimes that I really feel very

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[3677] CAROL B. KING,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Good morning, Ms. King. Let me reintroduce everyone here. I'm Paul Macaluso and this is Jim Nelson. When the trial begins, we will be joined by Norman Kinne. The three of us are assistant criminal district attorneys and we work for Henry Wade who, I'm sure you know, is the district attorney here in Dallas.

To Jim's immediate left is Brice Cunningham.

MR. CUNNINGHAM: Good morning.

Q I expect before too long he will be joined by another lawyer who was introduced to you yesterday, a tall man by the name of Royce West. They are the defense attorneys who have been appointed by the Court to represent the man charged with capital murder. He is the Defendant and his name is Thomas Joe Miller-El.

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[3679] want to ask, Ms. King, by all means ask it, all right?

A Okay.

Q Don't be bashful. If there is something you want to tell us, chime in at any time. I don't mean to be corny, but your opinion is the most important opinion. Everyone here has heard me talk for five weeks and they're bored stiff. We want to hear you. All right?

A Fine.

Q We're seeking the death penalty in this case, Ms. King. I just want to let you know as we've let every other juror to this point know. We are actively seeking the death penalty in this case for Thomas Joe Miller-El. What that means basically is, we know that the law allows for the death penalty in Texas under certain facts and certain circumstances and we intend, once the trial begins, to provide the jury with the type and quality of evidence that will convince them beyond any reasonable doubt that he's guilty just exactly as he's been charged. That's done in the first part of the trial.

[3680] In the second part of the trial, once again we intend to be able to provide the jury with the type and the quality of evidence that is going to convince them beyond any reasonable doubt that these questions should be answered yes. You know the effect of all yes answers is an automatic sentence of death?

A Yes, sir.

Q Now, everyone has an opinion. We have our opinions based on the evidence, but what is really going to count obviously is your opinion if you're on this jury. Without any further—let me just ask you, Ms. King, would you share with us your personal feelings about the death penalty? How do you personally feel about capital punishment and the death penalty and then secondly, do you know of any reason why you could not serve on a jury of this type and actually render a decision in this case that might result in the execution of Mr. Miller-El?

A Okay. Number one, I am in favor of the availability of the death penalty. I do not know of any reason why I

could not render a decision assuming that the answers are yes.

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[3702] A Yes.

Q You can consider all of the evidence that you used in convicting an individual to decide whether or not these questions should be answered yes and if you do, you answer them yes. It doesn't happen automatically, though. Do you understand that?

A Yes.

Q Could you do that?

A I think so.

Q I forgot to get into something with you. You know that capital murder in Texas is a very, very special type of murder. It's only for capital murder in Texas that you can receive the death penalty. Do you understand that?

A Yes.

Q There is an offense called murder. I'm sure you know that. It's just called murder. It has a very, very broad range of penalty. It's from five years to ninety-nine years or life. The law sets out that range of punishment for murder to encompass the infinite number of circumstances under which one person can commit murder, but you can't receive the **[3703]** death penalty for murder itself.

Now, murder is a situation where one person knowingly or intentionally—there's a legal definition that the Judge will give you for that term, knowingly or intentionally. They may be a little bit different than what you and I ordinarily would think those words mean. If one person knowingly or intentionally causes the death of another individual without any legal excuse or justification, that's murder. Now, there may be thousands of nonlegal justifications or excuses, but it doesn't excuse it because it's not a legal excuse. It doesn't justify it because it's not a legal justification, but you know as well as I do that there may be many factual situations

that mitigate or aggravate a killing, a murder. Do you see what I'm getting at?

A Yes.

Q Now, an example of a legal excuse or legal justification would be self-defense. If you believe someone committed a homicide, that it was in self-defense, that's not murder. If you believe someone killed accidentally or **[3704]** someone was killed accidentally, it's not murder. If you believe someone was insane, it's not murder. If you believe someone acted in the heat of passion, it's not murder.

Now, let me shift gears here for a second. Let's go up to what capital murder is. If you commit murder as I've described it and you commit murder under certain circumstances, then it's possible to get only the death penalty or a life sentence only. You see then, under those circumstances, murder becomes a very, very special type. It must be a murder of a police officer, fireman, jail guard, murder while escaping from a penal institution, murder for hire, mass murder or, as we've set out here, murder in conjunction with another very serious offense such as rape, robbery, burglary, arson or kidnapping.

Let me just ask you, those types of murder that I've set out, killing a police officer and so forth or murder plus, do those strike you generally speaking of the types of offenses that you feel the death penalty should be warranted depending upon the facts and circumstances?

[3705] A Yes.

Q Now, we talked about murder and we talked about capital murder. The Defendant, of course, is charged in this case with murder—we've alleged murder plus, murder during a robbery. I gather from what you said that you believe, depending upon the facts and the background, that's the type of case in which a person should receive the death penalty depending upon the evidence; is that correct?

A Yes.

Q Now, let's shift gears back to what I was talking about, murder. Let's say you're on a jury and let's say that

the State has alleged a capital murder. We've alleged a murder during a rape. That's a type of capital murder. If we expect you as a juror to find that individual guilty of capital murder, we have to prove both the murder and the rape. Do you understand that?

A Right.

Q Let's say you're on that jury and you don't have a doubt whatsoever that the murder occurred, but let's say you don't believe that—you didn't hear any testimony **[3706]** about a rape or you have a reasonable doubt that it was during a rape. Do you understand, if that were the situation, you would have to find that defendant not guilty of capital murder because we didn't prove the rape part of it. You would find him guilty of what we did prove, which is what?

A Murder.

Q Murder. If that were to happen, then you forget all about automatic life or automatic death or capital murder. Do you understand that?

A Yes.

Q I didn't mean to say automatic. I mean mandatory life or mandatory death. Instead you find the defendant guilty of murder and, you know, we have that very, very broad range of penalty. All the law expects of you in a situation like that, Ms. King, is, number one, you follow the law. I believe you said you could do that without a doubt. Whatever the law is, you will follow it. Number two, keep an open mind as to the full range of penalty, in other words not prejudge anything. In other words, sit over there as a juror, if **[3707]** you were on a murder case, and just tell us that you will follow the law you will wait and listen until you hear all of the evidence before you make up your mind on what the proper penalty should be. That's what the law expects of you because, you see, they gave you that very broad range of penalty to allow you to tailor basically, once you've heard all the evidence and all the background information, the relationship between the parties, what you learn about the defendant, what you learn about the victim, their backgrounds,

their relationship, all these things—do you see what I'm getting at?

A Right.

Q Because the law allows you properly to take into consideration—as the old clichéd goes—you've been around a criminal practice—tailor the punishment to fit the crime one you've heard the evidence. So Ms. King is sitting on the jury in a murder case, you know what the law is, five years to ninety-nine years or life and an optional $10,000.00 fine, and you're the type of person who can keep an open mind and wait until you've **[3708]** heard all of the evidence and then, if you decide the right thing to do, the proper thing to do and the just thing to do based on the evidence is to give the maximum, you'll give the maximum after you've heard all the evidence. Can you do that?

A Yes.

Q By the same token—you're the same type of person who will follow the law and you know the range of penalty—if you heard a case to your way of thinking after you've heard all the evidence—and you haven't heard any thus far, have you?

A No.

Q If you hear a case that calls for, warrants, and justifies, and it's the proper and the right thing to do to give the minimum, you will give the minimum whatever it is?

A I can do it.

Q In other words, knowing that the minimum is five years, you could do that?

A Yes.

Q If a proper case calls for ninety-nine years or life and an optional $10,000.00 fine and you think that's the right thing to do **[3709]** based on the evidence and the proper thing to do, can you do that as well?

A Yes.

Q And anywhere in between?

A Yes.

Q Now, you understand that you're not required as you sit there to think of a situation where you would give ninety—nine years or life or imagine a situation where you would give five years. You've just got to be able to say, if I see it, I'm the type of person who will give it. I may not be able to think of it, but I'll give it.

One little thing here I want to talk about briefly is the parole law. This is kind of an unusual situation. Everyone knows that parole exists for any type of crime whether it be murder, burglary, whatever the case may be. The Judge would actually give you an instruction as to the parole law. It's kind of an unusual thing because he would tell you that any sentence you impose is subject to parole and it's subject to consideration of good-time. In other words, a person could be discharged early. He will give you all these

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[3744] CHARLOTTE WHALEY,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Good morning, Ms. Whaley. As I was introduced to you yesterday, my name is Jim Nelson. The gentleman seated next to me is Paul Macaluso. I think the Judge told you yesterday that there will be a third gentleman involved and his name is Norman Kinne. The three of us are assistant district attorneys here in Dallas who have been assigned by Henry Wade to handle this case for the State of Texas.

The person immediately to my left is Mr. E. Brice Cunningham.

MR. CUNNINGHAM: Good morning. How are you?

MS. WHALEY: Fine.

Q Next to him is Mr. Royce West. These two gentlemen are attorneys in Dallas and they have been appointed by Judge McDowell to

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[3747] Q Okay. Ms. Whaley, I'm going to start out by telling you basically what our position is, that being the State of Texas. We are actively seeking the death penalty for Thomas Joe Miller-El. We feel we will be able to present to a jury the type and quality of evidence to allow them to convict him of the offense of capital murder. We know the law allows for the death penalty and we intend to present to the jury the type and quality of evidence that will allow them to answer three questions yes. If those three questions are answered yes, then the death penalty is automatically assessed by Judge McDowell. He has no options. He has no discretion in the matter. He must assess the death penalty if those questions are answered yes. That's basically where we are and what we're attempting to do and planning to do.

You filled out a questionnaire yesterday morning which was fairly detailed and you had to do it somewhat of a hurry I would guess under the circumstances. One of those questions, number fifty-six, involved your feelings about the death penalty and you **[3748]** answered that question. I would like to ask you, if you would, now that you've had a chance to sleep on it and think about it some more to tell us in your own words, first of all, how you feel about the death penalty and whether it serves a purpose and, secondly, how you feel about your ability to serve on this type of a jury?

A Well, as you know I circled both yes and No. I suppose I feel that the death penalty should be the very last resort. It would have to be a very clear-cut case where it was premeditation, obvious premeditation, and a very deliberate and cold-blooded act.

Q Do you feel then that the death penalty in some circumstances serves a purpose in our society?

A Yes, I do. I think it would keep someone from doing it again, protects society.

Q Do you feel like you're the type of person who can serve on a jury where the death penalty is one of the potential punishments?

A Again, it would depend on the circumstances. I think I could make the

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[3781] there, he is presumed to be innocent. It may be a bad analogy, but you remember the boy and the bubble, so to speak. That's what we're caging in at this point, the presumption of innocence. It's up to them to bust that bubble beyond a reasonable doubt. Okay?

A Right.

Q I want to focus in on these questions. Understand, if a citizen accused of a crime is found guilty of the criminal offense of capital murder, then we go to the second phase of the trial. The State's burden of proof is beyond a reasonable doubt. They have to prove to you beyond a reasonable doubt that the answers to questions one, two and three should be answered yes. If they don't prove it, then the answers should be no.

A Absolutely.

Q Now, I believe your first statement dealing with your response to question number fifty-six, "Do you believe in the death penalty? Please explain your answer.", you circled both yes and no and said, "Depending on the circumstances." When Mr. Nelson asked you about that you indicated that **[3782]** the death penalty should be the last resort. Is that your strong feeling?

A Yes, it is.

Q Okay. If it appears as though a person is capable of rehabilitation, then that should be an option; is that correct?

A Yes.

Q Ms. Whaley, do you have any questions of me?

A No, sir.

Q Have you understood everything that both sides have said?

A Yes, I have.

Q Thank you for being very patient.

MR. WEST: Pass the juror.

THE COURT: Mr. Nelson, what says the State?

MR. NELSON: May we have just a moment?

THE COURT: Surely.

MR. NELSON: The State will excuse Ms. Whaley.

THE COURT: Thank you, Mr. Nelson. Ms. Whaley, you will be excused from service. We really

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[3784] CATHERINE C. BARNARD,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Ms. Barnard, as I was introduced to you yesterday, my name is Jim Nelson. The rest of these people were introduced to you, but let me go through it again just real quick. Sitting next to me is Paul Macaluso. There will be one other prosecutor involved in this and his name is Norman Kinne. He will be presenting the evidence for the State of Texas. We're all three assistant district attorneys here in Dallas and we've been assigned by Henry Wade to handle this case for the State of Texas.

This is Mr. Brice Cunningham.

MR. CUNNINGHAM: How are you this afternoon?

Q Sitting next to him is Mr. Royce West.

MR. WEST: Good afternoon,

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[3786] anything. We're just basically trying to find out how you feel about certain issues that may or may not come up in this case. The Judge gave you an idea of what some of those are going to be when we talked yesterday.

I feel, Ms. Barnard, like I ought to tell you right off the bat what our position is. The State of Texas is actively seeking the death penalty for Thomas Joe Miller-El in this case. We feel that we will be able to present to twelve jurors the type and quality of evidence to allow them to convict him of the offense of capital murder and the type and quality of evidence that will allow them to answer three questions yes. If those three questions are answered yes, he gets the death penalty from Judge McDowell. Judge McDowell has no discretion and no options. The jury makes the decision and Judge McDowell just carries out that decision. That's basically how it works.

You had a chance yesterday to fill out a questionnaire. It was on kind of short notice, but one of the questions on there, number fifty-six, had to do with your feelings [3787] about the death penalty. Now that you've had a chance to sleep on it and think about it a little bit more, would you tell us please, in your own words, what your feelings are about the death penalty and whether it serves a purpose in society?

A I'm not against it. I don't know how to explain to you, but I think I could—

Q Do you feel like the death penalty serves a purpose in our society?

A I think it should.

Q Some people come in here and say, well, it's a deterrent factor. If people know it's there, maybe it will keep them from committing other crimes. Would you believe that might be the case?

A Yes.

Q Okay. Ms. Barnard, you're married; is that right?

A Uh-huh.

Q Would you hazard a guess as to how your husband feels about the death penalty, or do you know?

A I know. He's for it.

Q Now, Ms. Barnard, I want to talk

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[3801] more of those questions could be answered No. You may answer, and may be required to answer them, based on the facts that you heard on the first phase of the trial, but those facts may say to answer them no or they may say answer them yes. We don't know at this point what they're going to say to you, Ms. Barnard, but what we need to know from you is, assuming you've found this person guilty of capital murder, can you still answer those questions either yes or no based on what the evidence shows you?

A Yes.

Q It's not an automatic yes because the defendant has been found guilty and it's not an automatic no because he's been found guilty. You have to look at the evidence. Any problem with that?

A No.

Q Let me talk about one other thing that may come up. We don't anticipate that it will, but it might. We call this murder plus. Let's take a different situation, murder plus a burglary, for example. Say you're a juror on that case and you hear the testimony and the **[3802]** evidence and everybody has rested and closed, but all you've heard about is the murder. We've proved to you that the defendant knowingly or intentionally caused the death of another individual, but we haven't proved anything about a burglary. You didn't hear a word one about a burglary. We haven't proved capital murder, have we? We've just proved murder.

A Yes.

Q That's a lesser included offense of capital murder. Regular murder in the State of Texas does not carry the potential of the death penalty. It has the widest range of punishment of any criminal offense in the state, anywhere from five years up to ninety-nine years or life and an optional fine of up to $10,000.00. We talked a few minutes ago about self-defense. Self-defense is a legal justification for killing someone. If you find by a preponderance of the evidence, that it was self-defense, then it's your duty to find that person not guilty. If it was an accident, that person is not guilty of murder. If they were insane at the time, they're not guilty of **[3803]** murder. If it was a killing in the heat of passion—if I came home one day and my little four year old girl had been raped—

MR. CUNNINGHAM: Your Honor, again we will object to giving an actual situation.

THE COURT: I'll overrule in this situation.

MR. CUNNINGHAM: Note our exception.

Q —and the guy that did it was standing two houses down laughing about what he did to my little four year old girl, if I went down there and killed him, the jury might find that was a killing in the heat of passion, but that's not murder. That's voluntary manslaughter which is a different grade of offense with a different range of punishment. When we talk about murder, we talk about the knowing or intentional taking of another human life without any legal justification or without any legal excuse whatsoever. He knew he was going to kill him. He intended to kill him and he killed him without any legal justification or excuse.

[3804] The legislature gave us a wide range of punishment for a reason. Would you agree with me that there is—the word I like to use is—a myriad of circumstances under which murder can occur, those things we talked about a few minutes ago, prior relationship of the parties, actions of the parties. Third parties could be involved. It could be years and years of things building up. It could be a sudden situation. I suppose that, if we sat here the rest of the afternoon and into the evening, we could give you nonstop examples of different situations which would be murder. They are all the knowing or intentional killing of another human being without any legal justification or any legal excuse, but there may

be justification or excuses that don't amount to legal justification or excuses, just like there may be provocation that doesn't amount to self-defense, but it's still something the jury can consider.

In order for you to be qualified to serve on this jury, you have to be able to tell us and tell the defense that you can keep an open mind as to that entire range of **[3805]** punishment. Again, you don't have to be able to sit there right now and say I'll give life, anymore than you have to be able to sit there right now and say I'll give five years, because you don't know the facts. You don't know what the facts are going to show about the case or the people involved or the defendant, for that matter, if anything. We have to know from you that you will keep an open mind and listen to all of the evidence before you make a decision. Can you do that?

A Yes.

Q Okay. You don't have to be able to envision at this point, Ms. Barnard, a case where you would give a life sentence. You don't have to be able to envision a case where you could give a five year sentence. You don't have to be able to envision a case that you would give anything in between. As a matter of fact, the law does not want you trying to think of what would justify a five year sentence or what would justify a life sentence because the law wants you to keep an open mind as to the evidence. But what we do need to know is whether you can consider the entire range of **[3806]** punishment. Now, can consider, I guess, is a phrase, at least in this context, that is a legal type of phrase. It basically means, if you convicted someone of murder, you've heard all the facts and circumstances, everything about the crime, the people involved, the defendant, everything you're going to know, if after you've heard all of that, you feel like the facts and the circumstances call for and justify a sentence of life and a fine of $10,000.00, could you give that?

A Yes.

Q Let's go to the other end. Again, you've convicted someone of knowingly or intentionally causing the death of another human being without any legal justification or without any legal excuse. He intended to kill him, knew they were going to kill them, and killed them. It's not capital murder though, it's just murder. You've heard all the facts and circumstances about the case, about the defendant, about the other people involved. If after you've heard all that, you feel in your mind that those facts and circumstances call for and justify a five year sentence for the **[3807]** offense of murder, could you give that?

A Yes.

Q Do you have any problem with that?

A No.

Q Do you feel like you could keep an open mind as to the entire range of punishment?

A I think so.

Q If the facts called for life, you could give life?

A Yes.

Q If they called for five years, you could give five years? If they called for twenty-seven and a half years, you could give twenty-seven and a half years?

A Yes.

Q Any problem with that at all?

A I can't think of any.

Q All we're asking you to do, Ms. Barnard, is just keep an open mind and listen to all of the evidence before you make a decision and do whatever the facts and circumstances justify to you, whatever that may take. It may be one in a million that would call for a life sentence in your mind and maybe there should be one in a million, but if you **[3808]** see that one in a million case, you would give life or if you see the one in a million case that called for five years, you would give five years.

Now, we have people say I can't imagine. There's no way I could ever imagine a case that called for five years and you may think that four years from now, if you're sitting on a jury. I never thought I'd see it, but there it is. If it calls for five years, you give five years.

There is one more thing that enters into that. You probably have heard of parole. The law says and the Judge may instruct you that a person sentence to the Texas Department of Corrections can get credit for what is called good-time against their sentence or they may be paroled early. The law also says that that is under the exclusive jurisdiction of the Board of Pardons and Paroles and the governor. We can't control it. You can't control it and neither can Judge McDowell control it. So knowing all that, the law says, okay, you know this and it exists, but you can't control it so you can't consider

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[3884] argumentative or cross-examining you.

SUSAN K. PAGE,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Good morning, Ms. Page. As you may remember from Monday, my name is Jim Nelson. The man seated next to me here is Mr. Paul Macaluso. There will be one other gentleman involved for the State of Texas in this case and his name is Norman Kinne. Mr. Kinne is not here today, but will be when we start representing evidence in this case.

The man immediately to my left is E. Brice Cunningham.

MR. CUNNINGHAM: How are you this morning, Ms. Page?

Q Sitting next to him is Mr. Royce West.

MR. WEST: Ms. Page, good morning.

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[3886] relax and remember that there are no right or wrong answers to anything anyone is going to ask you and nobody is going to argue with you or try to change your mind. We're just going to try to find out how you feel about these things. This is our fifth week of jury selection and we have eight jurors. It's a little bit tedious and it takes some time and there are some issues that people have very deep feelings about and that's what we're trying to find out. If you will just bear with us and be as open and as honest as you can with us, then that will help us a great deal.

If you have any questions or if I get to talking too fast or if I don't make myself clear, please stop me and we'll get things cleared up because I want to be sure that we understand each other by the time we're finished here.

The position of the State of Texas in this case, Ms. Page, is that we are actively seeking the death penalty for Thomas Joe Miller-El. We know that the law allows for it in this type of case and we believe we can present to a jury the type and the quality of **[3887]** evidence to allow them to convict him of the offense of capital murder and then to allow a jury to answer three questions yes.

If those three questions are answered yes, then Judge McDowell has no choice but to assess the death sentence in this case. He has no options, no discretion in the matter. He must assess the death sentence if all those questions are answered yes. If those questions are answered no, he must assess a life sentence. We'll talk more about that in a few minutes.

That being our position, that doesn't make a whole lot of difference. What counts is your feelings about some things. You had a chance on Monday on rather short notice to fill out a questionnaire. One of the questions on there was about the death penalty and you answered it fairly completely, but you've had a couple of days to sleep on it and think about it. I would like to ask you, if you would, to tell us in your own words, first of all, how you feel about the death penalty and whether it serves a purpose in our society?

A I do believe in the death penalty,

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[3904] A Yes.

Q Let me shift gears just a little bit and talk about something that we don't anticipate will happen in this case, but it's a possibility so I want to talk about it. You remember that we called this murder plus. We have to prove murder plus another offense. Let's say, for example, a murder in the course of a burglary. You're sitting on the jury. We present the evidence and we prove to you the murder part of it. We prove that the defendant knowingly or intentionally caused the death of another human being, but you don't hear a word one about a burglary, no evidence at all that there was a burglary committed at the same time. We haven't proved capital murder at that point then, have we?

A No.

Q We've just proved murder. Murder in the State of Texas does not carry the possibility of the death penalty. It's the broadest range of punishment of any offense in the State of Texas, anywhere from five years up to ninety-nine years or life and a fine of up to $10,000.00, but death is not an option. You **[3905]** mentioned self-defense before. If a jury finds that it was self-defense, that's not murder. He's not guilty. If a jury finds that it was an accident, it's not murder. He's not guilty. If he's insane, he's not guilty. If it is a killing in the heat of passion—if I came home one night and saw my little four year old girl had been raped and abused and the guy that did it is standing two houses down laughing and telling everybody about it and I take my gun and go down there and blow him away, the jury might find that was a killing in the heat of passion. That's not murder. That's what we call voluntary manslaughter.

When we talk about murder, Ms. Page, we're talking about knowingly or intentionally causing the death of another human being without any legal justification like self-defense or without any legal excuse like insanity. I emphasize legal justification and legal excuse.

I suppose, if we sat here for the rest of the day, that the four of us could give you examples of different types of murders until it got dark tonight and not run out of **[3906]** them. They are probably a myriad of circumstances under which one person could murder another person. As you mentioned yourself, there may be provocations that don't amount to self-defense, but there is still provocation there. There may be a prior relationship between the parties and you could hear about that. Third persons involved, you can hear about that. All the circumstances of a murder case, you can hear about in a murder case.

In order for you to be qualified to serve on a jury, you have to be able to tell us that you can consider the entire range of punishment. When I say consider, I don't mean that you have to tell us right now, yes, I'll give five years or, yes, I'll give ninety-nine years or I'll give forty-three years because you haven't heard the facts. You don't know what the facts are at this point so you can't tell us that. As a matter of fact, you don't even have to be able to envision in your mind a set of facts and circumstances that would cause you to give life or would cause you to give five years. What we need to know from you, Ms. **[3907]** Page, after you've heard all the evidence and all the facts and circumstances, everything you're going to know about the case, about the defendant and everything else involved, after you've heard all of that, if you believe that a life sentence is called for and justified by those facts and circumstances as you heard them, can you give a life sentence?

A Yes, I could.

Q Let's go to the other end. Again, you've convicted someone of knowingly or intentionally causing the death of another human being without any legal justification and without any legal excuse, you've heard all the facts and circumstances of the case. You know everything about the murder, about the defendant and everything you're going to know. After you've heard all of that, if you believe a five year sentence is justified by the facts and circumstances, can you give a five year sentence?

A Yes, I could.

Q And you can give anything in between depending on what the facts call for; is that right?

[3908] A Yes, sir.

Q Again, all we're asking you to do, Ms. Page, is keep an open mind as to the entire range of punishment and after you've heard all of the evidence, if you feel five years is justified, give five years. If you feel life is justified, give life. If you think twenty-three point eight seven years is justified, then give that, whatever you feel is appropriate in your mind. You don't even have to be able to sit there right now and think of a set of circumstances that would justify those. As matter of fact, the law doesn't want you to because the law doesn't want you saying what has to be this for me to give five years. They just want you to be able to say, if you hear that five year case, even though it may be one in a million and you may think you'll never hear it, but you're sitting here in twenty years on another murder jury and you say, well, I never thought I'd hear it, but this is the five year case, you'll give five years. Do you feel like you can do that?

A Yes.

Q Even though you've told us how you **[3909]** feel about murder and giving people the death penalty for killing another human being and that kind of thing, you can follow the law; is that right?

A That's right.

Q And if it's murder consider five years up to life and, if it's capital murder, make a decision on those questions all the time based on the evidence; is that right?

A Yes.

Q Any problem with that at all?

A No.

Q Let me mention one other thing while I'm thinking about it. You have probably heard of parole. The Judge may give you an instruction that says a person who is sentenced to the penitentiary may receive good-time credit

based on his conduct in the penitentiary. By the same token, a person may be paroled from the penitentiary before his actual calendar sentence is completed, but the law goes on to say that you can't concern yourself with that because that is in the exclusive jurisdiction of the Board of Pardons and Paroles and the governor. You can't

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[3942] JANICE MACKEY,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Let me begin by reintroducing most everyone that will be involved directly in this case. As you may recall, I'm Paul Macaluso. This is Jim Nelson and we will be joined by another lawyer whose name is Norman Kinne. He's not here now. We're all assistant district attorneys and we work for the DA's office in Dallas and we've been designated as the lawyers to represent the State in this case.

Now, to Jim's immediate left is Mr. E. Brice Cunningham.

MR. CUNNINGHAM: Good morning, Ms. Mackey.

Q Momentarily, he will be joined by Mr. Royce West. They're the defense attorneys, I'm sure you recall, who were introduced the other day along with us. They are the lawyers

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[3946] other words. You just tell us how you honestly feel and, like I said, you will be doing your job. Furthermore, Ms. Mackey, if you have a question about anything, okay, don't be bashful, ask the question. If there is something that you need to tell us that we don't touch on, that you feel is

important, then by all means, in fairness to everybody, just let us know.

Let me tell you what our position is in this particular case, that is the State of Texas. Ms. Mackey, we are actively seeking the death penalty in this case for Thomas Joe Miller-El. We know that the law allows for it. The Judge told you that. The law does allow a person convicted of capital murder to receive potentially the death penalty. We are actively seeking it. What it boils down to is this: We intend to provide a jury with the type and quality of evidence at the end of the trial that will cause them, under the law, to find the Defendant guilty of capital murder just exactly as he is charged in this indictment. That's the first step and that's done in the first part of the trial.

[3947] Then in the second part of the trial, we intend to provide that jury with the same type and quality of evidence that will convince them beyond any reasonable doubt that the questions that the Judge would submit to you should be answered yes beyond any reasonable doubt, which will automatically result in Judge McDowell sentencing Thomas Joe Miller-El to be executed. What that means is in the legal process of things, after the pronouncement of sentence by Judge McDowell, the Defendant, after legal processes have been continued, would be taken down to the Texas Department of Corrections. He will be placed on death row and at such a time as designated by law, he would be taken to, what we call, the death house and at a particular time he would be placed on a gurney—do you know what a gurney is?

A Yes.

Q He would be taken to the death house and have what basically amounts to a needle inserted into his arm and then, under the law, a lethal substance, in other words a poisonous substance, would be placed in his **[3948]** body. Enough of it would be placed in there to cause his death. In other words, I don't mean to be gory about this thing and I don't mean to try and frighten you, but I just want to bring home the seriousness of what we're about here and what

we're ultimately trying to do under the law. We're trying to kill Thomas Joe Miller-El under the law. The law provides for it. That's what we're about here.

Now, I know that it might sound a little bit gory, but the reason I'm saying that is because we want you to have an accurate picture. We want all the jurors to have an accurate picture of just what the consequences are of this particular type of a trial. Now, as you well know—or as you may know—we are in our fifth week of jury selection. We have at this time eight jurors. You are prospective juror number one hundred, so you can see how laborious this process is and how long it takes. The whole idea of it all, as I said earlier, is to find out how you think and how you feel. Now, I'm doing all the talking right now, out you can see that this type of a case where it involves the death penalty, **[3949]** people have strong feelings, obviously, one way or the other. Do you see what I'm getting at?

A Yes.

Q We want to know how you feel about it ultimately and I'm going to stop talking here in just a minute and let you tell us how you feel personally about the death penalty, for one, and capital punishment and then secondly, your ability to actually serve on this type of a jury or to not serve. You've been asked this question, number fifty-six, and you said "Thou shall not kill"; is that correct?

A That's correct.

Q That's the way you felt Monday when you came down here?

A Yes.

Q Is that the way you feel now?

A Yes.

Q Just tell us a little bit more, kind of in your own words, how you feel about the death penalty.

A Well, I don't believe a person has the right to say who should be killed and who shouldn't going by what the crime is. Like I

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[4022] follow the law. She's not an ideal juror from the State's standpoint. I'm aware of that, but I'm going to hold that she is qualified.

Based on that, what is your pleasure?

THE COURT: Whatever we do, I'm not going to start until—I'm going to recess until about 12:30. Why don't you send the next juror to lunch, Bob?

MR. NELSON: We would like to put it on the record with the Court's permission that we are exercising a challenge because of what's been the subject of discussion with the Court for the last fifteen or twenty minutes, her reservations about the death penalty and her statements that she can't serve on this kind of jury and doesn't want any part of it and cannot give the death penalty or be part of anyone being

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[4028] BRENDA G. WALSH,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Good afternoon, Ms. Walsh. As you may remember, my name is Jim Nelson and I'm an assistant district attorney here in Dallas. Sitting next to me is Mr. Paul Macaluso. There will be one other gentleman involved for the State in this case and his name is Norman Kinne. He will be presenting the evidence for the State of Texas. The three of us are assistant district attorneys who have been assigned by Henry Wade to handle this case for the State of Texas.

To my left is Mr. E. Brice Cunningham.

MR. CUNNINGHAM: How are you, Ms. Walsh?

Q Next to him is Mr. Royce West.

MR. WEST: Good afternoon, Ms. Walsh.

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[4039] might have.

Let me just start out by telling you what our position is in this case. The State of Texas is actively seeking the death penalty for Thomas Joe Miller-El. We know that the law allows for it and we feel like we will be able to present to a jury sufficient evidence to allow you to convict him of the offense of capital murder. We feel we will be able to present the type and quality of evidence that will allow the jury to answer three questions yes. If those three questions are answered yes, Judge McDowell has no choice under the law but to sentence that man sitting right down there in the light blue suit to die. He has no discretion whatsoever. The jury's verdict controls. I'll talk about the details of how it works in a little bit.

The first thing I would like to know is—you had a chance to fill out a questionnaire on Monday morning probably in a situation where if I were in your shoes, I would have still been reeling a little bit from finding out it was a capital murder case.

A Yes, sir.

[4040] Q I know you didn't have a lot of time to think about it, but you've had a couple of nights to sleep on it now. I would guess it was on your mind to at least some extent. Would you tell us now just in your own words how you feel about the death penalty and whether it serves a purpose in our society?

A Okay. I believe in capital punishment for certain crimes as the law describes. I know there are a lot of people who would disagree with me who don't feel like it should be the law, but that's not to be decided, as I understand from what the Judge said, here. I think it does serve a purpose in certain cases. I do believe that sometimes there are extenuating circumstances that need to be considered. If all the evidence points to there being a conviction, then the jury

really doesn't have a choice. But it's based on that evidence that you have to decide.

Q Okay. How long have you felt this way about capital punishment? Have you ever felt differently?

A No, sir, I can't say that I have.

Q Your mother is still alive; is

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[4056] got to get the death penalty. In that situation, if we failed to prove that one of those questions should be answered yes, the law still requires you to answer it not even knowing it would result in a life sentence rather than the death penalty. By the same token, if you hear the facts of the case and you say, well, this guy doesn't really deserve to die, I don't think he ought to die, yet we've proved that each of those should be answered yes, you're required to answer them yes knowing that it will result in the death penalty. Do you feel like you can do that?

A. Yes, sir, I do.

Q Do you feel like you can set your emotional feelings aside and base your answers to those questions on the evidence that you hear?

A I think those questions are going to be a great help.

Q Okay. If we prove those to you, you will answer them yes and, if we fail to, you will answer them no?

A Yes.

Q There's one thing that may come **[4057]** up. We don't expect it to, but it might. I told you that we call this murder plus. We have to prove the murder plus another offense. Let's take murder and a burglary, for example. You're sitting on the jury and we present our evidence and you hear all about the murder and you hear all about the killing, but there is not a word about any burglary. We don't prove to you anything about a burglary. Then we haven't proved capital murder, have we?

A No, sir.

Q We've just proved murder. The offense of murder, alone, in the State of Texas does not carry the death penalty. It has a range of punishment of from five years up to ninety-nine years or life and a fine of up to $10,000.00, no death penalty. That's the widest range of punishment for any crime in the State of Texas. I guess that's there because of all the various circumstances under which a murder can occur. A murder is the knowing or intentional taking of another human life without any legal justification or without any legal excuse. For example, it you were on the jury and you decided that it was self-defense **[4058]** after you heard the facts, the person is not guilty. It's not murder. If you hear the facts and decide it was an accident, he's not guilty. It's not a murder case. If you hear the facts and decide he was insane, he's not guilty. Again, it's not a murder case. Even if it was a killing in the heat of passion if I came home one night and my little four year old girl had been raped and abused and the guy who did it was standing two houses down with a beer in his hand bragging about it and I took my gun and went down there and blew him away, the jury might find that was a killing in the heat of passion. If it was, then that's not murder, either. It's voluntary manslaughter. Murder is the knowing or intentional taking of another human life without any legal justification or legal excuse.

Now, there could be provocation or excuses or reasons that enter into the situation that don't amount to legal justification or excuses or legal reasons. Do you see the distinction there?

A Yes, sir.

[4059] Q Okay. The law allows you to consider all those things before you assess a sentence. You can hear all the facts of the case. You can hear about the prior relationship between the parties. You can hear what led up to the killing. You can hear if there was a third person involved. You can hear all about the person that did the killing, also. You can hear all those things. What the law asks you to do, Ms. Walsh, is keep an open mind as to what sentence you would give until you've heard all that evidence and to not close

your mind to one end or the other. Therefore, for you to be qualified to serve on this jury, you have to be able to tell us that you have an open mind as to the entire range of punishment for the offense of murder, anywhere from five years up to ninety-nine years or life. If you hear a ninety-nine year case, you can give ninety-nine years. If you hear a five year case, you can give five years.

The law doesn't even ask you to sit there right now and think if a situation where you would give ninety-nine years or think of a situation where you would give five years **[4060]** or a situation where you would give three years because the law does not want you making up your mind, well, this is what it's going to take for me to give a five year sentence. All the law says, if you hear a case that calls for a five year sentence, then you have to give a five year sentence. The phrase the law uses is able to consider, are you able to consider the entire range of punishment. I guess what it comes down to, Ms. Walsh, is this: You've heard the facts and you've convicted someone of the offense of murder, knowingly or intentionally killing another human being without any legal justification or legal excuse. He did it. He knew he was going to do it. He intended to kill the person and he did it plus whatever other facts and circumstances may enter into it. After you've heard all the facts you're going to hear, all the extraneous circumstances, everything about the defendant you're going to hear, if you feel, based on those facts and circumstances, that a ninety-nine year sentence or a life sentence is called for, would you and could you give that?

A Yes, sir.

[4061] Q Let's go to the other end. Again, you've convicted someone of knowingly or intentionally killing another human being without any legal justification or without any legal excuse. You've heard all the facts and circumstances and after hearing all the facts and circumstances, you believe in your mind that those facts and circumstances call for a five year sentence, could you and would you give a five year sentence?

A Yes, sir.

Q If it calls for twenty-three years, would you give that?

A Whatever the law calls for.

Q Okay. Whatever the evidence calls for, whatever you believe in your mind and in your heart is the correct sentence, that's what you will give; is that right?

A That's correct.

Q You don't have your mind closed to five years or ninety-nine years or anything in between?

A No, sir.

Q There may even be a situation—I'll submit to you that it ought to be a special case to allow for a life sentence. It ought to be a **[4062]** special case to allow for a five year sentence, the minimum. You may even sit up there and think, I'm never, ever going to hear a case that calls for five years. Thirty years from now you're sitting over here on a jury and you say, after hearing all the facts, I never thought I'd hear one, but here it is. This one calls for five years, so you give five years. That's all the law asks you to do. Do you have any problem with that at all?

A No, sir.

Q Let me mention one other thing while I'm on that subject. You probably heard some discussion of parole?

A Yes, sir.

Q The judge may instruct you and the law is, prisoners in the Texas Department of Corrections can get credit for what is called good-time for their conduct while they're down there. It can be credited against their sentence. They can also be paroled before their calendar sentence has been completely served, but the law goes on to say that those types of things are under the exclusive

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[4102] PAUL BAILEY,

called as jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Good afternoon, Mr. Bailey. Let me reintroduce everyone here briefly. I'm Paul Macaluso. This is Jim Nelson. We will be joined by another assistant district attorney once the trial itself begins. His name is Norman Kinne. We're the State's attorneys in this particular case.

To Jim's immediate left is Mr. E. Brice Cunningham.

MR. CUNNINGHAM: How are you, Mr. Bailey?

MR. BAILEY: Fine. Thank you.

Q To his immediate left is Mr. Royce West.

MR. WEST: Mr. Bailey, good afternoon.

Q They're the defense attorneys and

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[4107] personal opinion, no one is going to quarrel with you or argue with you or try and change your mind and talk you into or out of anything. Just speak your mind and we'll respect your opinion and, like I said, you will be doing your job.

Let me tell you what our position is in this particular case. We are actively seeking in this case for Thomas Joe Miller-El the death penalty. We know that the law allows for it under very special types of capital murder cases. We intend to be able to provide a jury—and we have nine people so far and we need three more. We intend to be able to provide this jury once it is selected—and that would mean you if you were on the jury with the type and quality of evidence in the first part of the trial, the guilt or innocence part of the trial, to convince the jurors beyond any reasonable doubt that the Defendant, Thomas Joe Miller-El, is guilty of capital murder just exactly as he has been indicted.

Then in the second part of the trial, once again we intend to be able to provide the jury—and that would mean you if **[4108]** you were on the jury—with the type and the quality of evidence that would convince them beyond any reasonable doubt whatsoever that those questions, and the questions determine death or life, should be answered yes. You know from what the Judge told you, three yes answers equals a mandatory sentence of death. That's our position based on the evidence.

You understand that ultimately it's the position of the jurors that counts, but we want you to know what our position is from the outset. It is our desire, based on the evidence and allowed for by law, that he be assessed that sentence of death which, as you know--and I don't mean to be gory about this, Mr. Bailey—that means death by lethal injection here in Texas. This is not something, of course, I think you realize, that you may be talking to someone about over coffee or reading about in the paper or hearing on the radio or on T. You are in the middle of the situation where you may be called upon, if you can, to serve on a jury of this type and render a decision, if you can, that might result in your actually making a decision that would **[4109]** result in the execution of that man right down there. That is, at some point in time if the death penalty is returned, he will be taken down to Huntsville, Texas and at some point designated by law, a particular time that is set up, he will be moved over to the death house and at some particular point in time, he will be taken out of the death house and placed on a gurney, taken into the death house itself where there is a procedure where they will put needle into his arm and inject him with a lethal substance sufficient to cause his death. That's the ungarnished truth of the matter. We can talk about it, capital punishment, and call it all kinds of glossy things, but that will be the final result, we feel, based on the evidence in a case of this type, if the jury follows the law and follows the evidence we believe that we're going to be able to present during this trial. Do you see what I'm getting at?

A Yes, sir.

Q All right. So with all that long involved introduction out of the way, as I said earlier, the most important opinion, the most important decision, in this type of a very, **[4110]** very serious case where the stakes are as high as they are, is your opinion. I know you were asked this question about the death penalty here, number fifty-six, "Do you believe in the death penalty?" Originally you circled yes and then you wrote no and you crossed out your answer and you wrote "No one has the right to take another one's life." Why don't you just tell us in your own words—you've had a couple of nights to think about it and mull it over in your mind—how you feel about the death penalty and capital punishment generally speaking and then secondly, how you feel about your ability to actually serve on this type of a case and actually participate in that decision-making process where someone such as the Defendant would be executed?

A My honest opinion—I don't believe in capital punishment. Like I said on there, I don't believe anyone has the right to take another person's life. If he committed a crime and if he is convicted and it's proven without a shadow of a doubt, as you say, then, yes, I believe he should be punished. He should be rehabilitated or whatever can be done, but I

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[4168] between counsel and the Court, after which the following proceedings were held.)

THE COURT: Mr. Macaluso, I'm going to hold that he is qualified. I respectfully disagree with the State on it.

MR. MACALUSO: Judge, in light of the Court's ruling and in light of the statements made by the Court, we'll use a preemptory challenge.

THE COURT: Bring Mr. Bailey back in, please.

Mr. Bailey, you're going to be excused from service in this case. I'm sorry you had to wait out there in the hall.

Off the record, Pam.

(Whereupon, an off the record discussion was held, after which the following proceedings were held.)

THE COURT: Mr. Jones, how

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[4171] RUSSELL L. JONES,

called as a jury panel member, having peen duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Good afternoon, Mr. Jones. As I was introduced to you on Monday, my name is Jim Nelson. The gentleman seated next to me is Mr. Paul Macaluso. There will be a third attorney involved for the State of Texas whose name is Norman Kinne. Mr. Kinne will present the evidence for the State in this case. We are all three assistant district attorneys and we've been assigned by Henry Wade to handle this case for the State of Texas.

Seated to my left is Mr. E. Bricē Cunningham.

MR. CUNNINGHAM: How are you, Mr. Jones?

Q He will probably be joined in a few moments by Mr. Royce West. Mr. Cunningham and Mr. West have been appointed by Judge McDowell to defendant Thomas Joe Miller-El, the

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[4173] you will feel a little more comfortable and it will be a little easier for you to talk about some things in this format than it would in front of forty or fifty other people. As the Judge said, let me invite you to relax. You don't look nervous up there now. Hopefully you will relax and be comfortable with us and be as honest and as open as you can in talking about these things. Remember that there are no right or wrong answers to anything we're going to talk about.

This is Mr. West right here.

We just need to know how you feel about these things and that's where we're headed and that's what I'm going to try to talk to you about during the next few minutes.

Mr. Jones, I feel like to start things out I ought to tell you what our position is in this case, that being the State of Texas. We are actively seeking the death penalty for Thomas Joe Miller-El. We know the law allows for it in this type of offense and we intend to present to a jury and to you if you're on that jury the facts and evidence to allow the jury to convict him of the offense of **[4174]** capital murder. Then we intend to present the type and quality of evidence to allow a jury answer three questions yes. If those three questions are answered yes, judge McDowell has no option whatsoever but to assess the death penalty in this case. He doesn't have any discretion in the matter. The decision is made by the jury. We'll talk about that in a little bit more detail as we go through here. That's our position. What counts is your position.

You had a chance to fill out a questionnaire on Monday and you've had a couple of nights to sleep on it. I would guess to come in here expecting to be on another civil case or a shoplifting or something and finding out it's a capital murder would kind of shake me up a little bit, I think. Now that you've had a chance to sleep on it, would you tell us please your feelings about the death penalty, whether it serves a purpose or not, and secondly, whether you feel like you could serve on this type of jury?

A Well, I'm for the death penalty as a matter of principle. I feel like it is a deterrent to crime. I guess I could serve on

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[4187] A Yes, sir.

Q Do you feel like you can set your personal feelings aside and answer those questions based on the evidence?

A Yes.

Q Any problem with that at all?

A No.

Q Okay. Mr. Jones, there's another thing that may come up in this case. We don't anticipate that it will, but it might. I told you that we called this murder plus. Let's take a different case. Let's say you're a juror on a capital murder where it's an alleged murder during the commission of a burglary. We present our evidence and you hear about the murder and we prove beyond a reasonable doubt that the man committed murder, but you don't hear a word about a burglary. There's no evidence at all about a burglary. Then we haven't proved capital murder, have we?

A No.

Q We've proved murder?

A Yes.

Q Murder in the State of Texas is the knowing or intentional killing of another **[4188]** human being. It does not carry the death penalty. The range of punishment for murder in Texas is the broadest for any offense in the State of Texas, anywhere from five years up to ninety-nine years or life and a fine of up to $10,000.00. When I say the knowing or intentional killing of another human being, we're talking about somebody who did it, knew they were going to do it, intended to do it, however you want to put it. It's not a self-defense situation because if the jury finds self-defense, then a person is not guilty. It's not an accident. If the jury were to find it was an accident, again, he's not guilty. If the jury were to find that he was insane at the time, he would be not guilty. It's not a killing in the heat of passion.

I have a four year old daughter. If I came home one night and I found out that somebody had come in and raped and abused her and the guy that did it was standing two houses down with a beer in his hand laughing about it, I might very well go down there and just blow him off the face of the earth. If I did that, the jury might decide that was a killing in the **[4189]** heat of passion. That's not murder in Texas. That's what we call voluntary manslaughter. It's a different crime with a different range of punishment. So we

say murder is the killing of another human being without any legal justification or without any legal excuse. Again, those are self-defense, accident, the things I ran through. Would you agree with me, Mr. Jones, that there are hundreds, if not thousands, of different situations in which one person could kill another person?

A Yes.

Q I imagine that the four lawyers here could sit here with you from now until tomorrow morning and we could keep coming up with examples of different ways murder could occur. We aren't allowed to give you examples, just like we're not allowed to give you the facts of this case. There may be provocation involved that doesn't amount to self-defense and it doesn't amount to a legal excuse or legal justification, but it's still something you can consider. You can consider the prior relationships between the parties. You can consider if there were third persons involved. **[4190]** You can consider anything leading up to the murder. All the surrounding facts and circumstances come into play. In order for you to be qualified to serve on a jury like this, Mr. Jones, you have to be able to tell us that you have an open mind as to that entire range of punishment, that your mind isn't closed to one end or the other or to the whole thing, for that matter. When I say to have an open mind, the legal phrase used is able to consider, are you able to consider the entire range of punishment. You don't even have to me able to sit there right now and think of a situation where you would give a life sentence or think of a situation where you would give a fifteen year sentence or think of a situation where you would give a five year sentence. The law doesn't even want you to do that. If you were sitting there and decided, well, this is a five year case and this is what I have to hear to give five years, then you've closed your mind to some other things that might be a five year case. Obviously you can't tell us right now what you would do in a case because you haven't heard any of the evidence, so you don't know.

[4191] Again, it's back to that old phrase. We're asking you to keep an open mind until you've heard all of the evi-

dence. What we need to know from you, Mr. Jones, is if you can consider that entire range of punishment. Let me put it this way: if you were sitting on a jury and you convicted a person of murder, he knowingly or intentionally caused the death of another human being without any legal justification, without any legal excuse, they killed them, knew they were going to kill them and they did it, after you've heard all the facts and circumstances of that case, everything about the offense itself and, everything about the defendant, other persons that might have been involved, all the surrounding facts and circumstances, if you believed after hearing all of that, that those facts and circumstances justified a ninety-nine year or life sentence, could you give a ninety-nine year or life sentence? That's been a pretty long-winded question.

A It sure was.

Q Do I need to compact it a little bit?

[4192] A Well, I think I could look at it openly and make a judgment yes or no.

Q If the facts and circumstances called for a life sentence, you could give a life sentence?

A Right.

Q Let's go to the other end. Again you've convicted somebody of murder. You've heard all the facts and circumstances. If those facts and circumstances in your mind justify and call for a five year sentence, could your give a five year sentence, could you give a five year sentence for the offense of murder?

A I guess I could make a decision, but five years for murder—

MR. WEST: I'm sorry, sir. I didn't hear the last part.

A I said the five years for murder would be kind of light.

Q Okay. As I said, it's a very wide range of punishment for the offense of murder. I guess there is a myriad of circumstances under which murder can occur. What we're asking you, Mr. Jones—as I think I said, you don't even have

to be able to think of a **[4193]** situation that calls for five years. You may say, I can't imagine hearing a set of circumstances that would justify a five year sentence for the offense of murder. What we're asking you is—you may be sitting here twenty from now on another case, a murder case, and you've heard all the facts and circumstances and you say, wow, I never thought I'd hear it, but here it is. Here is that one in a million case that the facts and circumstances justify a five years sentence. If you get in that situation and those facts and circumstances say to Mr. Jones that it calls for a five year sentence, can you give a five year sentence?

A Yeah, if the facts say it and that's what the law says.

Q That's the law and that's what the judge will instruct you is the law. You're asked to base your verdict on the evidence, on the facts and circumstances. If that evidence calls for twenty-three years in your mind, then you could give twenty-three years. If it calls for life, you could give life. If it calls for five years and you thought five years was proper in your mind, you will give five years; **[4194]** is that right?

A I guess I could, but—

Q Okay.

MR. WEST: Your Honor, could this gentleman be allowed to finish his answer?

THE COURT: Did you have something you wanted to add to that, Mr. Jones?

A I thought that I would listen to the evidence and it was either guilty or not guilty, you know, answer the three yes. So why are you bringing up the five years?

Q Okay. As I talked about earlier, we have murder plus in this case.

A Right.

Q There is also the possibility—we don't anticipate it, but there is the possibility that you would not find that this murder was committed in the course of a robbery, so you

would find in that case that he was guilty of murder, not of capital murder. The only time those questions come into play is on capital murder. If you as a jury feel that we have not proved capital murder, all we have **[4195]** proved is murder. If you find him guilty of murder, then it will be your duty to assess they punishment for that case of murder. It's what we call a lesser included offense of capital murder. That's why I'm having to go into all this stuff because it's kind of like buying flight insurance, I guess. You don't expect Delta Flight No. 121 to go down in the field north of DFW, but people buy flight insurance on the slim chance that it might. Since there is a possibility that you might be put in that situation, then we have to be sure that you're qualified under the law to assess the punishment in that situation for the offense of murder. In order for you to be qualified, you have to be able to consider that entire range of punishment for the offense of murder, not capital murder. Does that make it more clear?

A Right.

Q All we're asking of you, Mr. Jones—and I'm sorry I didn't make that clear earlier. It may be an extremely rare case and probably should be an extremely rare case where you would give either extreme of punishment, see that extremely rare case, that **[4196]** the facts and circumstances justify a sentence of five years, could you give a sentence or five years?

A Yes, I could, yeah.

Q That's the law. That's what the law says in Texas. You may personally feel that, if you were governor or you had the power to set the range of punishment, you might say it ought to be fifty years and up for murder or something like that. Just like I might say, when I get out in west Texas, that I ought to be able to drive eighty-five instead of fifty-five when you can see a hundred miles in every direction. But the speed limit is fifty-five, so that's what I drive. If the law is—they may not believe that's true. If the law is that the range of punishment is from five years up to life for

the offense of murder, you could abide by that law; is that right?

A Yes.

Q If you hear a five year case, you could give a five year sentence?

A Yes.

Q There is one other thing that you've probably heard something about and that

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[4240] FILEMON P. ZABLAN,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Let me begin by reintroducing everybody here. You may remember anyway, but I'm Paul Macaluso. This is Jim Nelson.

MR. NELSON: Good afternoon.

Q The man to Jim's immediate left is Mr. Brice Cunningham.

MR. CUNNINGHAM: Good afternoon, Mr. Zablan.

Q The vacant chair next to him will be occupied by Mr. Royce West. They're the defense attorneys who have been appointed by the Court to represent the Defendant. He's in the far right chair over there. Can you see him there? His name is Thomas Joe Miller-El and he is charged with capital murder.

Jim and I are assistant criminal district attorneys here in Dallas. We represent the State. Do you know any one of us or have **[4241]** you ever heard of any one of us?

A No, sir.

Q Mr. Zablan, as you know, you are a prospective juror on this case. We have nine jurors so far. We've considered over a hundred people so far and we only have nine. You can see it's a very drawn-out and tedious process. This is the middle of the fifth week that we've been doing this.

We want to talk to you and basically we want to find out how you think and how you feel about certain things and I want to emphasize right from the start that no one is going to argue with you or quarrel with you about your feelings about anything. No one is going to try to talk you into anything or out of anything. We just want to know how Mr. Zablan feels because this is a very, very serious case as I'm sure you know. It involves the very highest level of offense. Mr. Miller-El is charged with capital murder. If a person is convicted of capital murder in Texas, he can receive only one of two possible penalties. One is a sentence of death by lethal injection and the other is a sentence of life. You can **[4242]** see how high the stakes are and how serious this is and why we need to talk to you seriously to see how you feel about certain things.

I'm going to say this again because I do repeat myself. I want you to understand that no one is going to try and change your mind or argue with you about anything. What is absolutely the most important, Mr. Zablan, is you simply tell us honestly how you feel about anything that might affect your service on this case. Will you do that?

A Yes.

Q If you have a question about anything, ask it. If there is something that you need to tell us, tell us. Don't be bashful. The other thing is, I want you to relax.

Ordinarily we would be talking to you out in front of a bunch of other people. We want you to relax as much as you can and feel as comfortable as you can and just speak your mind.

Let me tell you what our **[4243]** position is, that is the position of the State of Texas. we are actively seeking the death penalty in this case for that Defendant right down there. In other words, we know that the law allows in certain cases for the death penalty and we intend to provide the

type of evidence to a jury, once it is selected, that would convince them beyond any reasonable doubt that the Defendant is guilty of capital murder exactly as he is charged. Now, that's done in the first part of the trial.

In the second part of the trial where the penalty is returned, either death or life, we intend again to offer the jury the type of evidence that would convince them beyond a reasonable doubt that those questions should be answered yes. You know the result, all yes answers, yes, yes, yes, equals death. There is no question about it. If the jury answers each question yes based on the evidence, then the law absolutely requires Judge McDowell to sentence that man right there—take him down to Huntsville, Texas and eventually have a needle put in his arm and they would kill him.

[4244] The reason why I mention that is not to make it sound real dramatic or tragic or anything, but it's just that a lot of people I suppose come down here on jury duty thinking they are going to be on a burglary case or a theft case or something like that or a DWI. All of a sudden they get into this courtroom and they find out they're involved in a death penalty case. It's no longer a situation where we all sit around at various times and talk about how we feel about this and how we feel about that, over coffee or a beer or something. How do you feel about the death penalty? It's one thing to talk about it, isn't it, and it's another thing to find yourself in a position where you may be called upon to actually make the decision that would result in this man actually being executed. You know that they, a execute people.

It's not like it was ten years ago where they gave people death sentences, but no one was ever executed. They were all commuted to life or whatever happened. I'm just trying to draw things into focus for everybody, just in fairness to everybody, so they really **[4245]** appreciate just how serious this is and then of course how incredibly important any decision you make is and what effect it would have if you serve on this jury.

Now, I've done enough talking. I know you filled out a questionnaire on Monday and you had very little time to accomplish that. Now that you've had a couple of days to sleep on it, would you share with us your personal feelings about the death penalty generally speaking and then your ability to actually serve on a jury of this type and make a decision based on the evidence and the law? How do you feel about the death penalty?

A The way I feel is, is that the punishment should fit the crime, no more, no less.

Q Do you feel that the death penalty serves a particular purpose in our society as a function?

A Yes, sir.

Q How do you perceive that?

A I guess, if somebody is really guilty of like shooting a person, beyond a reasonable doubt he is guilty, then he is going **[4246]** to be a menace to society and he should be put away.

Q Have you felt that way for a number of years?

A I have not given it a lot of thought, but when I do, I have to be really convinced because it is taking a man's life away.

Q The law absolutely requires you to be convinced beyond a reasonable doubt.

A Yes.

Q Your response to question number fifty-six in the questionnaire was "If it's the law and if the crime fits such punishment."

A Yes, sir.

Q I gather from what you said there—you didn't have a whole lot of time to think about that—that you're the type of person who believes very strongly in following the law. Some of us have some misgivings about some of the aspects of the law, but the courtroom is not the place to change the law.

A The reason I said that is, if it is the law, I believe in it. Some states don't have a death penalty. If I live in that state **[4247]** and abide by it, unless somebody comes over and changes the law, then that is the law for me.

Q If it is the law, whether you agree or disagree with it, you're going to follow it?

A Yes.

Q And your answer here, if the facts of the crime, what you learn once the trial begins, calls for a guilty verdict, then you will go by the facts and the law?

A Yes.

Q You can put aside your personal feelings one way or the other and follow the law and be guided by the facts?

A Yes.

Q Even though you may be guided by this aspect of the law?

A It depends on the case. If in my conscience there is really no question about it, then I would have no reservation in applying the law. I might follow the law with some reservation, but it is the law and I have to have it clear in my conscience.

Q Let's talk a little bit about capital murder. A person can only receive the **[4248]** death penalty in Texas as an option in very special circumstances, very limited number of circumstances. Number one, it must involve, but just not any kind of murder. It must be a very, very special type of murder that the law has designated and called capital murder.

Now, murder is actually an offense in Texas. That is what we call a first degree felony. It is not an offense that you can receive the death penalty for. Murder carries a punishment of from five years to ninety-nine years or life and you can even receive an optional $10,000.00 fine. Murder becomes capital murder when it is the killing of a particular class of individuals, you murder a police officer or a fireman, prison guard, you kill someone to collect insurance or mass

murder. Situations under those circumstances are elevated to capital murder where you can receive the death sentence or a life sentence, one person killing another person during a burglary, robbery or while raping them. Murdering somebody during an arson or a kidnapping, the law says that is a special type of murder and is even more serious and you can **[4249]** receive the death sentence or a life sentence only because it is a capital murder. Do you have any problem with that?

A No.

Q Murder plus a felony, that is called murder plus. We have alleged in this indictment that the Defendant murdered a man named Douglas Walker while in course of committing or attempting to commit robbery. Do you see what I'm getting at, murder plus? Does that type of offense, murder during a robbery, strike you personally as the type of offense that you feel the death penalty would be warranted depending on the facts of the case?

A Yes.

Q And assuming we prove the Defendant is guilty beyond a reasonable doubt, you could find the Defendant guilty of capital murder?

A Yes.

Q Let's talk a little bit about some things that come into play in any type of a criminal case and certainly in a capital murder case. This may sound like a civics lesson on some things that are fundamental whether it is **[4250]** a shoplifting case or a capital murder case. I know you're familiar with all of these things, but we want to go over them in a case like this just because they're so incredibly important in fairness to both sides, okay?

A Okay.

Q First off, you start off with the presumption of innocence. You understand that?

A Yes, sir.

Q That's something that is fundamental to our system of justice, as you well know. That is, at the start of a criminal trial, anybody charged with a crime is presumed to be innocent. All right?

A Yes, sir.

Q In other words, as you look at the Defendant over there, you must tell us in all honesty that you presume that he is innocent. That's where we start off. That's the starting point in any criminal trial. You must look towards the State to overcome or rebut the presumption with the evidence to convince you beyond a reasonable doubt that he is guilty, otherwise you continue to believe that he is not guilty. Can you do that?

[4251] A Yes, sir.

Q In other words, the fact that he has been arrested , and we can reasonably assume he has been arrested and indicated and that he is here in the courtroom today, some people might say, well, you know, where there's smoke, there's fire. He must but a little bit guilty. Well, you know that's not how the law works. No one is just a little bit guilty. We either prove that he's guilty or he's innocent. Do you see what I'm getting at?

A Yes, sir.

Q As he sits there, you have no problem at all presuming that he is innocent; is that correct?

A That's right, sir.

Q All right. I can't think of anything that is any more fundamental to our system or any more important that that. Now, you understand that the indictment is on evidence of guilty. You understand that?

A Yes, sir.

Q We can go to the Grand Jury and get an indictment and accuse somebody of an offense, but that doesn't mean we can prove it, **[4252]** does it?

A That's right, sir.

Q You know that people are charged by indictment all the time and juries find them not guilty. Cases are dismissed sometimes. So the indictment is no evidence at all. All it is, is a legal document that tells him what he is charged with and that's all it is. It doesn't matter how bad it sounds, but it's not any evidence at all and you would not consider it as any evidence, would you?

A No, sir.

Q Okay. The next thing is, you know that the burden of proof in any criminal case is always on the State?

A Yes, sir.

Q We have brought forth this indictment and we have accused him of capital murder and the law says we can do that, but you know the old saying, he who does the accusing does all the proving. It's kind of like, put up or shut up type of deal. That's what it boils down to. When I was a kid growing up, that's how it went. We pointed the finger at him and the law says, fine, but we must come **[4253]** forward with all of the evidence to convince you, as you said you would require, to convince you beyond any reasonable doubt whatsoever that he is guilty and then, if we do, the law is clear. You should find him guilty, do you see, if we convince you beyond a reasonable doubt.

On the other hand, if we don't convince you beyond a reasonable doubt, if we don't live up to our burden of proof, you should find him not guilty. Will you do that?

A Yes, sir.

Q All right. It's really pretty cut and dried, isn't it?

A Yes.

Q If we prove what's in here beyond a reasonable doubt and you don't have any reasonable doubt, you find him guilty. If we don't, cut him loose. Fair enough?

A That's right.

Q Now, understand that we have the burden of proof at all times, in both phases of the trial, in both arts of the trial. The Defendant and his lawyers have absolutely no

burden of proof whatsoever, none. The only requirement that the law sets out for a **[4254]** defendant in a case at any time is that he be here for the trial. I'm reasonably sure that he will be here for the trial, but beyond that he can sit there and not say a word and not call a witness and not do a single thing because he has absolutely no burden to do anything under the law at all. Do you have any problem with that at all?

A No, sir.

Q That seems fair enough under our system, doesn't it?

A Yes, sir.

Q Okay. The same thing, he has no burden to disprove anything. In other words, you can sit over there as a juror and listen to the State and see what kind of evidence we bring forward and, if we convince you beyond a reasonable doubt that he did this, if we do fine, you convict him. But if we don't, you cut him loose. Whether he calls any witnesses or whether he testifies or not, it doesn't matter. Can you do that?

A Yes, sir.

Q In other words, when you look towards the proof in support of this **[4255]** indictment, where are you going to look?

A To the State.

Q To the State, at the prosecutor?

A Yes, sir.

Q That's us. Okay. Now, you understand that any person charged with a crime, and that would hold true for me, for you, or anybody, my daughter charged with a crime, they have the right to remain silent. You know in the Soviet Union, as you well know, you're guilty until you prove yourself innocent, right?

A Yes.

Q That's not how it is here obviously. Even though anyone who is charged with a crime can testify and they can

call witnesses if they want to, you know that they have no burden to do that. If a defendant chooses not to testify, then you cannot consider that as any evidence whatsoever of the defendant's guilt. Do you understand that?

A Yes, sir.

Q In other words, even though you may be curious why a defendant didn't get up and testify, if he doesn't, the law that the **[4256]** judge would actually instruct you he would actually give you written instructions that you cannot talk about it, think about it, or even consider it as any evidence whatsoever of the defendant's guilt. Would you have any problem in that regard at all?

A No.

Q Can you tell the Defendant and tell us that you would not consider a failure of his to testify as any evidence at all? Can you tell him that?

A Yes, sir.

Q Now, let's talk about criminal trials generally speaking and how they're conducted. Have you served on a jury before?

A No, this is the first time.

Q A criminal trial is divided into two parts. The first part concerns itself only with the guilt or the innocence of the person who is on trial. In other words, you listen to the evidence and at the end of the first part of the trial, if you're convinced the Defendant is guilty, find him guilty. If we haven't convinced you, whether the defendant has testified or not, cut him loose. Fair enough?

[4257] If you find him not guilty, that's the end of the trial. If on the other hand you find him guilty, then we go on into the second phase where you get these questions and that's where the determination is made as to either death or life.

Now, you understand that just because you convict somebody of capital murder doesn't mean that they automatically get the death penalty. You understand that?

A Yes.

Q In fact, you understand that they either get a death sentence or a life sentence depending upon the answers to those questions. You understand that we're seeking the death penalty and we're the ones that want the death penalty just like we want you to convict him, based on the evidence. The law says, fine. Just like the law says we must prove and convince you beyond a reasonable doubt that he has committed the offense, the same thing would hold true in the second part of the trial. We have the burden of proof to convince you that the questions should be answered yes. You know the effect of three yes answers equals death **[4258]** automatically. The law would automatically require the Judge to assess a sentence of death.

One or more no answers equals an automatic life sentence. Do you see what I'm getting at?

A Yes, sir.

Q If we expect you to answer those questions yes and if we want you to answer those questions yes, then we must convince you beyond any reasonable doubt by the evidence that the questions should be answered yes.

A That's right.

Q Then he gets the death sentence. If not, if we don't convince you beyond a reasonable doubt and if you think one of those questions should be answered no, then so be it and he gets his life sentence. Fair enough?

A Yes, sir.

Q Will you make the State prove that each of those questions should be yes before you answer them yes? Would you require that kind of proof beyond a reasonable doubt?

A Oh, definitely.

Q Okay. Now, in the old days, until **[4259]** about thirteen years ago, in a capital murder trial, after the jury heard all the evidence, they actually decided life or death directly just like they do in the movies. If all of the jury believed he

should get death, he got death. If they all agreed it should be life, then that's what it was.

Let me ask you, do you think you could have made a decision like that based on the evidence after you heard the evidence in a capital murder case? If you felt it was proper to give death, you would have given death and if you felt it was proper to give life, you would give life?

A The majority rule and, if all the evidence was presented and I don't have any reservations in my mind, no doubts, then I would say yes.

Q You understand that the jury has to act unanimously? In other words, you vote your own conscience individually. You decide for yourself what you think is proper, but for any verdict to result, say the death sentence, must be unanimous, all the jurors must agree.

A That's right.

[4260] Q Now, the law changed about twelve years ago and no longer do the jurors decide directly, personally, subjectively, whether or not someone should die or get a life sentence like they used to do in the old days. Instead all you're called upon to do is to listen to all of the evidence in both parts of the trial, you see, and then the Judge would give you those three questions to answer. He may only give you the first two, but whether he gives you two or three, you're called upon to answer the questions. If the proof is there that convinces you that the questions should be answered yes, you answer them yes. If not, you answer them no.

You know that the effect of all yes answers is death and one or more no answers is life. Can you do that?

A Yes, sir.

Q Let's look at the questions. I think you probably had a chance to read the first two questions while you were sitting out with the panel here the other day. Do you have any questions about them at all?

A I have no questions.

[4261] Q How about number three?

Q [sic] I have no questions.

Q Okay. Let's look at them very briefly, okay? The first question, I think, is pretty self-explanatory, isn't it?

A Yes.

Q It asks you to decide whether the defendant acted deliberately and with the reasonable expectation that someone was going to die. Can you see when you learn about the facts of the offense and how everything happened you could make that decision, did the defendant act deliberately and with the reasonable expectation that someone was going to die? Do you see how you could answer that question yes or no depending upon the evidence?

A Right.

Q Let's go on to number two. That's a question that looks towards future behavior, would you agree with me?

A (No response.)

Q Well, let me just ask you this: What do you think you're being asked in that particular question?

A In other words, would he commit **[4262]** another murder over there.

Q Sir?

A I said would he commit another murder, in number two, if he's set free.

Q Okay. Would you agree that a key word in, that question is that word probability?

A That's right. That's what I'm looking at, probability.

Q What does probability mean to you in the context of that question? What do you think that means?

A It may happen and it may not happen.

Q More likely not, fifty-fifty?

A That's right, fifty-fifty.

Q I noticed that you said murder, that he would commit another murder. You notice that they didn't say another murder, did they? They said criminal acts of violence. Would

you agree with me that murder, of course, is a criminal act of violence?

A Yes.

Q What comes to your mind when you think of criminal acts of violence?

A Continue to be a menace to **[4263]** society.

Q Like committing some criminal acts of violence. It may be a murder. It may be a robbery.

A That's right.

Q It may be some sort of physical assault of some type.

A That's right.

Q Mr. Zablan, what do you think would be most helpful to you in answering those questions yes? What would you want to know about the background or about an individual that you feel would be most beneficial in answering that question?

A Well, I have to know like the background of the individual, his environment, where he grew up, who his friends are and usually background, environment and home, I guess.

Q Okay. Let me ask you, would you agree that almost every human event is divided into three phases; what happens immediately before the event, what happens during, and what happens after?

A Yes, sir.

[4264] Q Even a capital murder. In other words, you would be able to learn when you learn about the offense if there was any planning involved in the murder, what role a defendant had, if any at all. In other words, was he directly involved or indirectly involved? Then during the offense, was he a leader or was he a follower, did he have to do the killing, did the killing have to happen or was there some other course of action that could have been taken instead of killing somebody? Do you see what I'm getting at?

A Yes.

Q Afterwards, was he sorry and remorseful, was he contrite or was it blase and nonchalant, you know, another day at the office? Do you feel you could learn enough about an individual when you learn all the dynamics, the full spectrum of criminal behavior, of one criminal episode where you could say, yeah, there's a chance that this guy is going to commit—he would be a menace to society from now on? Do you think you could answer the question yes when you learned all about the crime itself?

[4265] A Yes, sir.

Q Now, number three, that asks you basically—that boils down to this, I think: Was this a provoked killing or was it an unprovoked killing? Would you agree with me?

A Yes, I agree with you.

Q If you decided that it was an unprovoked killing, then you question yes?

A Yes.

Q If you decide that there was some provocation—

A Then I have to answer it no.

Q Right. You could answer that yes or no as well; is that correct?

A Definitely.

Q You understand that these questions here are provided, I think, to the jury to kind of insulate a jury from emotional decision. In other words, under the old way the jurors decided emotionally or subjectively whether someone should die or live. Now, we know you could be sitting over there, any juror could be sitting over there, and listen to a capital murder case and decide, **[4266]** well, yeah, it makes your blood boil. You could hear facts that are so bad. Yet, on the other hand—you know, that would cause you to convict somebody. But yet on the other hand, when it comes to answering these three questions, the State may not have given you enough answers to satisfy you that the questions should be answered yes. Do you see what I'm getting at?

A Uh-huh.

Q You understand that your oath as a juror would require you to answer the question no which would result in a life sentence. Do you see what I'm getting at?

A Yes.

Q Something contrary to your personal feelings. The same thing would hold true, if you decided that someone ought not to die, but you would say that you would vote for a life sentence. You can't vote for a life sentence, can you? All you can do is answer the questions. If the proof measures up to three yes answers which would result in a death sentence, you have to go ahead and answer them. In other words, you put aside your personal **[4267]** feelings and simply answer the questions and let the law take its course. Can you do that?

A Yes, sir, I could.

Q Okay. Let's shift gears here for a second and let's talk about something that I'm not suggesting would occur in this case, but we'll just discuss it because there is always the possibility. Let's imagine for a moment that you're on a jury, a capital murder jury. Let's say that the indictment alleges a murder plus a burglary. That's capital murder. Let's say you hear all the evidence that convinces you beyond a reasonable doubt that murder occurred, but you don't hear any evidence about the burglary or you have a reasonable doubt, so you're not convinced that the murder occurred during a burglary. Am I making myself clear?

A Yes.

Q Bearing in mind that we must prove both the murder and the burglary if we expect you to find that defendant guilty of capital murder, you see we haven't lived up to our burden, have we?

A No.

[4268] Q All we have proved is murder. We didn't prove capital murder, did we?

A No, you didn't.

Q Now, if that were to happen let's say you found someone not guilty of capital murder, but instead guilty of what we did prove, which was murder, then you have to forget all about life or death, you see, because that's not even in the range of punishment. Am I making myself clear?

A Yes.

Q The range of punishment for murder, and murder is a separate offense altogether, under the laws of Texas is as broad as it is for any offense. There is no broader range of punishment whatsoever. The legislature has set out, we feel, that broad range, from five years to ninety-nine years or life and a $10,000.00 fine, so that the jury can basically tailor the punishment to fit the crime once the jury has heard all of the facts. Fair enough?

A Yes.

Q That's what it boils down to. know that's a cliche, make the punishment fit **[4269]** the crime, but it's true. That's what the law says. Number one, the law expects you simply to tell us, to be a qualified juror, that you will follow the law, consider that full range of penalty and that you have not closed your mind to any part of that range of penalty, to have an open mind and you will tell us that you have—of course, you haven't heard any evidence yet—

A No, I haven't.

Q —and you're an open-minded person and you will wait and you will listen to all of the evidence and then and only then, once you've heard all of the evidence in the murder case, you will decide what the penalty ought to be. If you hear facts and circumstances that call for and warrant and justify—in other words, you just feel it's the right thing to do to give the maximum, you will give the maximum. If on the other hand, you're a juror on a murder case and you have an open mind and you sit over there and you listen until all the facts are in and you hear a fact situation that to your way of thinking calls for and warrants and justifies and again it's **[4270]** the right thing to do based on the evidence which

you've heard to give the minimum, you will give the minimum. Can you do that?

A Yes, sir.

Q You know as well as I do—we've both lived long enough to know to know [sic] this: A murder is a murder. Sure, it's bad because someone dies, someone has been killed. Will you agree with me that there are all different types of facts and circumstances that surround murders?

A Yes.

Q And the law allows you to decide whether a case should get the maximum for murder or the minimum or somewhere in between—the law allows you to consider all the important things like what? Like the background of the victim. What kind of a person was the victim? What kind of person was the defendant? What happened? What precipitated this murder? What were the circumstances? What brought this thing on and why?

A That's right.

Q Do you see what I mean?

[4271] A Yes.

Q Now, murder is actually a situation where one person knowingly or intentionally causes the death of another. Those are legal terms, knowingly or intentionally. The Judge will actually define them.

A Because in my mind I have to be sure—or I have to be sure that the man is innocent all through the trial. He's got to be innocent until the very last word has been said. Whether he's guilty or not—

Q That [sic] precisely [sic] correct.

A That's going to be in my mind. I'm not going to prejudge or anything else. I'm just going to sit there and listen and find out what the heck is going on and why is this guy over here or if he's supposed to be out there in the streets working somewhere, why is he in here.

Q In other words, you will guided by the evidence?

A That's right, sir.

Q And you will be guided by the law; is that correct?

[4272] A Definitely.

Q In other words, you said you're not going to prejudge anything. You will have an open mind. What I'm getting at about murder is, the law allows you to take into consideration all of the facts and circumstances surrounding a murder and then you decide what the proper thing to do is once you have all that evidence presented to you. I want you to bear in mind a couple of important things. Murder is a situation under the law legally speaking where one person knowingly or intentionally causes the death of another. That's without any legal excuse or any legal justification. In other words, it's not self-defense and it's not accident. If you found that somebody killed someone and it was an accident or in self-defense, you would have to find them not guilty. Do you understand that? That's not murder.

A That's right.

Q If for example you thought someone was insane, that's a homicide, but it's not murder. For example, if you had a situation where somebody killed someone and it was a **[4273]** crime of passion—for example, if somebody came home and found out that their daughter had been raped by the neighbor and the neighbor is up the street laughing about it, drinking a beer and bragging about it, and that father got a gun and went up there and killed the neighbor, you see, that's a homicide and it's a crime, but it's not murder. That's what we call a crime of passion. We're not talking about that. We're talking about where one person, for whatever reason he may have that you might learn about during the trial, killed somebody and it's murder. Are you telling us that you will wait in a situation like that and, if you see a case that calls for the minimum, five years, you will give five years? If you feel that's the right thing to do, can you give—

A Yes.

Q If you hear a fact situation and you feel after you've heard all of the facts that it calls for ninety-nine years or life

and you think that's the right thing to do, will you give ninety-nine years or life?

A Yes, sir.

[4274] Q And anywhere in between that you feel is proper; is that correct?

A Yes.

Q In other words, you haven't closed your mind to a five year sentence or a ninety-nine year sentence?

A No, sir.

Q One other matter here and let me just address this briefly. The Judge would also instruct you as to the law of parole. Now, you've heard of parole, haven't you?

A Yes, sir.

Q What this means basically as the Judge will instruct you, anyone who is charged with a crime and convicted of a crime, whether it be murder, burglary or whatever it may be, and is sentenced to the department of corrections may become eligible for parole and good-time. In other words, that's good conduct in the penitentiary. The judge would instruct you as to the law in that regard. Then the judge would go on and tell you that, since it cannot be accurately determined how that will actually come into play, in other words, how soon someone would be paroled or how much good **[4275]** time they would get, do you see, that you as a juror could not consider that in deciding how much penalty a person should get. Am I making myself clear?

A Yes, sir.

Q In other words, they kind of tell you about it and then they say to forget it. That's what the law expects of you. The judge will actually instruct you that you cannot consider it in deciding whether someone gets five years, fifteen years or how much time they're going to serve before they get paroled. You just put that all out of your mind. If you think someone deserves five years, you give them five years. If you think someone deserves ten years, you give them ten or ninety-nine years or life. Can you do that?

A Yes.

Q One last matter. You understand that you as a juror will decide the believability or the credibility of the witnesses who testify?

A Yes, sir.

Q the law is very clear about this, that you do not prejudge any particular **[4276]** witness because of the nature of their profession or occupation or their station in life. In other words, you take the witnesses as they come. You don't give anyone a head start, so to speak. You just sit there and tell us that you would judge everybody by the same yardstick and you will wait and keep an open mind and listen to what they have to say and then after they say what they have to say, you will decide how much or how little of their testimony to believe.

A That's right.

Q Can you do that?

A Yes, sir.

Q One last matter, I promise. The Judge talked to you about basing a conviction on the testimony of one eyewitness if you believed the eyewitness beyond a reasonable doubt. Can you do that?

A Yes, sir.

Q Mr. Zablan, I'm out of time and the Judge has been very patient with me. Do you have any questions at all of me at this time?

A No, sir.

[4277] Q Can you be fair to both sides?

A Yes, sir.

Q I think you can, too, Mr. Zablan. Thank you very much.

MR. MACALUSO: I'll pass the juror.

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[4296] at the number of years that you are to assess. Could you and would you do that, sir?

A Yes, sir.

Q Do you know of any reason why you could not be a fair and impartial juror if chosen, sir?

A Nothing at this time.

MR. CUNNINGHAM: Pass the juror, Your Honor.

MR. MACALUSO: Your Honor, the State would be pleased to accept Mr. Zablan as a juror on this case.

MR. CUNNINGHAM: The defense would be pleased to accept Mr. Zablan as the tenth juror in this case.

THE COURT: Thank you. Mr. Zablan, let me ask you first of all to raise your right hand.

(Whereupon, the juror was duly sworn by the Court.)

THE COURT: You have just been sworn as a juror in this case. As one of the lawyers, I

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[4301] ANNA L. KEATON,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q Good morning, Ms. Keaton. You may remember from Monday that my name is Jim Nelson. I want to reintroduce everybody here because it's been a couple of days. The gentleman seated next to me is Mr. Paul Macaluso. There will be one other attorney involved for the State of Texas when we start the testimony in this case and his name is Norman Kinne. The three of us are assistant district attorneys here in Dallas and we've been assigned by Henry Wade to handle this case for the State of Texas.

The man to my left is Mr. E. Brice Cunningham.

MR. CUNNINGHAM: Good morning, Ms. Keaton.

Q Next to him is Mr. Royce West.

MR. WEST: Ms. Keaton, good

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[4304] uncomfortable, but the law requires me to do it. It may seem like I'm going back over things eight or ten different ways from time to time, but again the law requires me to do that kind of thing, so I hope you will be patient with me and bear with me as we go through this. I'm really not such a bad guy. I'm not trying to make anybody uncomfortable.

Now, I guess I ought to start out, Ms. Keaton, by telling you basically what our position is in this case, that being the State of Texas. We are actively seeking the death penalty for Thomas Joe Miller-El. We know the law allows it. We feel like we will be able to present the type and quali[t]y of evidence to a jury to convict him of the offense of capital murder. We also feel, Ms. Keaton, once he is convicted of the offense of capital murder, we will be able to present the type and quali[t]y of evidence to allow the jury to answer three questions yes. If those three questions are answered yes, Judge McDowell has absolutely no choice in the matter but to assess the death penalty for that man sitting right there in that light blue suit.

[4305] Now, I know when I talk about things like capital punishment or the IRS laws or whatever it is, it's pretty easy to talk about when you're not really involved. We're down here talking about Thomas Joe Miller-El's life, whether he's going to live or die. The people that sit on this jury are going to make that decision, Ms. Keaton. I guess it's kind of like a job. I want you to be as clear as you can be in what you would be dealing with if you served on this jury and what's coming because, once you have a seat over there, it's too late for you to change your mind. We have to find out now whether you're the kind of person that can serve on this kind of jury [sic]. Like I say, we've been working on this for five weeks and we have ten people. You can that everybody is not suited to serve on this kind of jury. It's

kind of like me walking over to one of these buildings they're building down here and somebody asks me to be a steel worker and walking a beam seventy floors up.

I guess I'm physically qualified to do it. I've got two arms and two legs and reasonable sense of balance, but there's no way **[4306]** in the world you would get me up on the seventieth floor walking a beam that is that wide (indicating). I just wouldn't do it. Although I'm qualified, I'm not suited to do that kind of thing. We've had people come down here the same way and serve on this kind of a jury.

Ms. Keaton, I guess what it comes down to is, we want you to know, if the evidence comes out the way we expect it will, the way we anticipate that it will, we're going to ask the jury to answer those three questions yes. If they are, that means that Thomas Joe Miller-El, sitting right there, at some point will be sentenced to die. He will be taken to Huntsville, Texas and placed on death row where he will stay until a few days before the time appointed by law at which time he will be moved to a group of cells near what they call the death house. At the time appointed by law, he will be taken from his cell. He will be put on a gurney—or I was told last night, it's called a litter, one of those rolling beds that they put you on to go to surgery or something—and he will be strapped down. **[4307]** That man right down there will be taken into the death house. He will have an IV put into his arm and they will start what they call a saline solution in that I. As he lays there, at the appointed time, a doctor will put a lethal substance into that IV and that substance will be injected into his veins until he dies, until the life is gone from that man sitting right down there, Thomas Joe Miller-El.

I'm not trying to draw horrible pictures or anything, but at some point we anticipate that is going to happen. The jurors that render that verdict are going to have a part in that. Now, I feel like it is only fair that you know that's our position and that's what we anticipate.

Now, on Monday you had a chance to fill out a questionnaire. It's very lengthy and we've gone over those. The one

question I want to focus on at least right now is question number fifty-six, "How do you feel about the death penalty?" You answered it. You said, "It's not for me to punish anyone," I believe are the words you used on it. You've had a couple of three days to sleep on it now and to **[4308]** think about it. I would just like you to tell us, if you would, in your own words what your feelings are about the death penalty and whether it serves a purpose in our society?

A Well, I still think it's not for me to decide.

Q Okay. Let me go a little bit farther. As I said, we still need two more people to serve on this jury. People who are going to serve on this jury are going to have to decide after hearing the evidence.

A Yes.

Q First of all whether he's guilty or not guilty and second whether he's going to receive the death penalty or not. We don't want, Ms. Keaton, twelve blood-thirsty people jumping up and down to give this guy the death penalty. That's not the way it's going to work. That's not what we're going to have. What we do need, both sides need, is twelve people who feel that they can make the decisions that need to be made. If the evidence shows that he's guilty, they will find him guilty.

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[4314] A Can I say something?

Q Sure.

A This is me. I wouldn't even think of killing anybody unless I was trying to save myself.

THE COURT: That's what we need to know, Ms. Keaton, just that kind of thing. How you feel, which way you feel, is important and I think the lawyers would agree. We care how you feel, but we don't care which way you feel. In other words, we just need to know how Ms. Keaton feels about any of these questions including that. I think that's what the lawyers are asking and maybe sometimes they ask it a little different than maybe I would or the other lawyers

would, but that's just the way lawyers are. We ask questions different ways at different times, but as long as you tell us how you feel about these things, that's really all

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[4328] about the death penalty, the fact that you couldn't kill somebody. Did you have those feelings even before he started getting into trouble?

A I think I've always had those feelings.

Q Okay. I hope you understand that no one here is trying to change those feelings. We're just trying to—

A I understand.

Q I guess what we're trying to do is get them down on paper for the court reporter and the Judge and make sure that we're clear on everything because I'm certainly not going to argue with you and these lawyers over here shouldn't argue with you because I think you've made it very clear how you feel about things.

Just to kind of wrap things up, I want to try to summa rize, if I can. You correct me if I say anything that you disagree with or I say anything that is wrong. You've told us that you've felt all your life basically that you can't be involved in killing another human being unless it is to save your own life; is that right?

[4329] A Yes.

Q Also because you have a son who has been in some trouble, you feel sympathy or whatever word you want to use for his family and the situation they're in and it is because of those things that you don't feel like you can sit on this jury and be part of sentencing a man to die; is that right?

A Right.

Q Ms. Keaton, based on that, if you were given a choice, which you will be, whether to take the oath or not take the oath to sit on this jury, would you refuse to take the oath and say, I just can't do it, Judge? Again, there's noth-

ing great about serving on the jury and nothing bad about not serving. We just need to know because, if you don't feel like you can in good conscience sit on that jury and answer these questions, then no one is going to make you.

A I don't think I could.

Q Okay. So you would prefer not to take the oath; is that right?

A Right.

Q Ms. Keaton, we've been talking **[4330]** here for a half an hour or maybe a little bit more and no one is going to argue with you and, if I tried, I couldn't change your mind, could I, couldn't change your feelings about these things?

A No, you couldn't change my feelings.

Q No one is going to play lawyer with you and no one is going to try to change your feelings and no one should argue with you. I think you've made them very clear. These lawyers over here may have some questions for you, but I'm sure they aren't going to argue with you or try to change your mind. By telling me what you've told me, I think it's pretty clear how you feel and I appreciate your honesty with me and your patience with us, also. Thank you very much, Ms. Keaton, and I've enjoyed talking with you.

MR. NELSON: Your Honor, I'll pass the juror and also submit the juror.

MR. CUNNINGHAM: Your Honor, we have a legal question we need to take up.

[4331] THE COURT: Okay. The best way to do this is maybe give you a little chance to get off the witness stand. I need to take a law question up with these lawyers, so let me ask you to step out in the hall.

(Whereupon, Ms. Keaton left the courtroom, after which the following proceedings were held.)

MR. CUNNINGHAM: Your Honor, we believe that Ms. Keaton is qualified through Wainright versus Wick, in that the State has not shown; one, that she could not take the oath; two, she has not said that she would automatically vote

no to one of those questions to keeping him from getting the death penalty. Her last answers with respect to the oath were, "I don't think I could", "I would prefer not to." She has not positively stated "I will not take

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[4373] I'll give you a chance to argue with me as I have been.

MR. NELSON: We'll excuse, Ms. Keaton.

MR. WEST: For record purposes we would indicate that she is a black female.

MR. NELSON: We would also like the record to reflect, Your Honor, our reasons for using a preemptory strike is her equivocations on the ability to give the death penalty, her comments to me that the fact that this man would die would affect her ability to answer those questions and would affect her in listening to the evidence and further that she has a son who has been involved in the penal system and she sympathizes with Thomas Joe Miller-El's mother and knows how she would feel. We feel because of that, she could not be fair.

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[4377] FERNANDO GUTIERREZ,

called as a jury panel member, having been duly sworn by the Court to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. MACALUSO:

Q Good morning. Let me begin by reintroducing everybody here. You may remember anyway, but I'm Paul Macaluso. This is Jim Nelson.

MR. NELSON: Good morning.

Q The man to Jim's immediate left is Mr. Brice Cunningham.

MR. CUNNINGHAM: Good morning.

Q The vacant chair next to him will be occupied by Mr. Royce West. They're the defense attorneys who have been appointed by the judge to represent the Defendant. He's in the far right chair over there. Can you see him there?

A Yes.

Q His name is Thomas Joe Miller-El. He's charged with capital murder. Jim and I **[4378]** are assistant criminal district attorneys here in Dallas and we represent the State. Do you know any one of us or have you heard of any one of us?

A No, sir.

Q Mr. Gutierrez, as you know you are a prospective juror in this case. We have ten jurors so far. We've considered over a hundred people so far and we only have ten. You can see that it is a very drawn-out process. This is the middle of the fifth week that we've been doing this. We want to talk to you and basically we want to find out how you feel and how you think about certain things and I want to emphasize, Mr. Gutierrez, right from the start that no one is going to argue with you or quarrel with you about your feelings. No one is going to try and talk you into anything or out of anything. We just want to know how you feel because this is a very serious case, as I'm sure you know. It involves the very highest level of offense. Mr. Miller-El is charged with capital murder. If a person is convicted of capital murder in Texas he can receive only one of two possible penalties. **[4379]** One is a sentence or death by lethal injection and the other is a sentence of life. You can see how high the stakes are and how serious this is and why we need to talk to you seriously to see flow you feel about certain things.

I do repeat myself, but I'm going to say this again. I want you to understand that no one is going to try and change your mind or argue with you about anything. what is most important, Mr. Gutierrez, is that you simply tell us

honestly how you feel about anything that might affect your service on this jury. Can you do that?

A Yes.

Q If you have a question, sir, about anything, ask it. If there is something that you need to tell us, tell us. The other thing is, I want you to relax. Ordinarily when we talk to you, you would be out in front of forty or fifty other people. We want you to relax as much as you can and just feel as comfortable as you can and just speak your mind. Okay?

A Yes, sir.

Q Let me tell you what our position **[4380]** is, Mr. Gutierrez, that is the position of the State of Texas. We are actively seeking the death penalty in this case for that Defendant right down there. In other words, we know that the law allows in certain cases for the death penalty and we intend to provide the type of evidence to this jury, once it is selected, that would convince them beyond any reasonable doubt that the Defendant is guilty of capital murder exactly as he is charged. That's done in the first part of the trial.

In the second part of the trial where the penalty is determined, either death or life, we intend to again offer the jury the type of evidence that would convince them beyond any reasonable doubt that those questions that we just talked about should be answered yes. You know the result of all yes answers yes, yes, yes, equals death. There is no question about it. If the jury answers each question they get yes based on evidence, then the law absolutely requires Judge McDowell to sentence that man absolutely requires Judge McDowell to sentence that man right there—take him down to Huntsville, Texas and eventually have a needle put in his arm and they would kill him.

[4381] The reason why I mention that is not to make it sound real dramatic or tragic or anything. It's just that a lot of people come down here thinking that they're going to be on a burglary case or a theft case or something like that or a DWI. All of a sudden they get up in this courtroom and find out that they're involved in a death penalty case. It's no

longer a situation where we all sit around and talk about how we feel about this or that over a cup of coffee or a beer or something. How do you feel about the death penalty? How do you feel about capital punishment?

It's one thing to talk about it, isn't it?

A Yes.

Q And it's another thing to find yourself in a position where you may be called upon to actually make the decision that would result in this man actually being executed. You know that they execute people. It's not like it was a few years ago when they gave people death sentences and then they never executed them. They were commuted to life or something else. I'm just trying to bring **[4382]** things into focus for everybody and just in fairness to everybody so that they really do appreciate just how serious this situation is and then, of course, how incredibly important any decision you make is and what affect it would have if you serve on this jury.

Now, I've done a lot or talking. We want to know how you feel. You were asked the question about the death penalty. That was on Monday and today is Thursday and you've had a little bit of time to think about it, haven't you?

A Yes, sir.

Q Have you done some more thinking about it?

A I sure have, sir.

Q Why don't you just tell us as openly as you can how you feel about the death penalty and then whether or not you feel you could actually be the one to make a decision that would end this man's life?

A Ever since I was informed of the nature of the crime, I realize that it was time to stop talking and really think about it. I have thought about it and there is still a **[4383]** thinking process going on in my mind as to what the actual reaction is because I don't guess anybody is really sure of what they would do until finally you come to that point. I'm sure, if the evidence proves that the answers are yes, then that would be a person's responsibility to answer

yes to all three questions. As far as personally how I feel about, it's something that is still unclear in my mind. I have respect for life as everybody does and sometimes that has to be put aside for a greater need of the people.

Q All right. If you could, would you expand on that a little bit and tell us how you feel about the death penalty generally. I know you've expressed yourself a little bit to this point. I mean, do you feel there are circumstances where people ought to receive the death penalty?

A I believe in the nature of the crime, maybe possibly brutality or other evidence that pointed to that it was justified. There are some crimes which I would imagine to serve the life, but more evidence would point that this particular crime was deserving of it, **[4384]** then I believe it should receive the death penalty.

Q Let me put it this way: Could you tell us what you think of, what comes to your mind, as the type of case or type of individual, the type of Defendant, where you feel that you could vote for the death penalty, that you could feel that it would be justified that somebody be legally executed? What sort of offense comes to your mind? What would it take, for example?

A At first I think of some crazy that's mentally insane. Of course that's off the top of my mind. That's basically as far as I have narrowed it down.

MR. CUNNINGHAM: I can hardly hear you.

A Should I repeat that?

Q Yes, sir.

A At the top of my list for the death penalty, I would immediately think of somebody that is criminally insane and with no hope of rehabilitation.

Q Let me just say this because I know most of the people who come down here are **[4385]** not lawyers and obviously are not well-versed in the law. If you were on a jury, whether it be a capital murder case or any kind of a case, and you found somebody was criminally insane, then you couldn't convict them of any offense. That's a defense. Just like that

guy Hinckley who shot the president, he shot the president and everyone saw him, but you know that jury apparently believed that he was insane at the time or had a reasonable doubt about it and they found him not guilty by reason of insanity. Do you understand, if you were on the jury, you would have to find somebody charged with capital murder not guilty by reason of insanity, so can you think, of any other example?

A Okay. I guess what I was really thinking, now that the law is clear, is just somebody that is maybe a habitual murderer or something that really needs to be taken up.

Q Let me just ask you: Do you could hear facts of a single crime that would be bad enough where you would feel a person to your way of thinking be deserving of the death penalty?

[4386] A I believe if the brutality of the crime was such because I have a feeling that in the commission of a crime some of the circumstances could possibly make a person react in a different manner, but nonetheless the crime is done.

Q Let's suppose you hear—you know, when you learn about a crime whether it may be a capital murder or whatever it may be, you can learn basically the three phrases that surround any event; what happens before a crime, what happens during a crime, what happens after. It's like any event. For example, if you were on a capital murder case—you see, capital murder in this particular instance, in this indictment, we have alleged a murder, that the Defendant murdered a man while he was robbing him. He was robbing somebody and then he kills them, see. That's what we would have to prove to you beyond a reasonable doubt.

So you decide in the second part of the trial whether the questions should be answered yes or no which actually results in the death sentence or a life sentence. You **[4387]** would be allowed to consider whether or not—what happened before the crime, what happened during the crime, what happened after. For example, was the robbery planned? Was it well planned? Who did the planning? Did the Defendant do it or did someone else do it? Did he know

beforehand that he was going to rob somebody, take a gun for example and go in there, plan it all out, choreograph the whole thing? Could you consider that important?

A Yes.

Q All right. What about during the crime where you would hear about what role he had to play? Was he a bystander? Was he the look-out or the get-away driver? Was he there calling all the shots and giving all the directions and pulling the trigger? Do you see? Did he have to kill the individual? Was it necessary or could he have just walked away? Do you see what I'm getting at? Are those some of the circumstances that you're thinking about?

A Yes, sir, I believe so.

Q How vicious was it? Did he have to do that? Then afterwards, was he the type of person who afterwards hung his head and **[4388]** said "Oh my, God. What have I done? I'm sorry. I wish I could wipe it away?" Was he the type of person who just didn't care anyhow? He was just completely nonchalant, just relaxed and cool as a cucumber. If you took those things into account, do you feel like you could learn enough about an individual from on offense where you could say possibly to your way of thinking that's the type of person that deserves the death penalty?

A I believe so, sir. Presented with the proper evidence of the crime, I do believe that I could answer the questions fairly.

Q Let me just ask you this: On question fifty-eight, you put down there—the questions is "Do you have any moral, religious, or personal beliefs that would prevent you from returning a verdict which would ultimately result in the execution of another human being?" You indicated, yes, that you did have some personal belief or moral belief that would prevent you from doing that. Is that the way you felt on Monday or have you changed your mind or what?

A Well, after thinking about it, **[4389]** like I said, I have always talked about it and I've had some religious beliefs about it, but then I sort of thought about it and then—if

I can go to the Bible, it says to obey the laws of man and there immediately I said, well, I should be part of the judicial process and make sure that an individual gets a fair trial. If he is deserving of death or life or of innocence, then he should, I believe—I could give a fair opinion after the evidence is presented.

Q Let me just ask you in all honesty, Mr. Gutierrez, do you feel like you're leaning one way or the other? Are you more likely to feel that someone ought to be spared than leaning the other way? Some people think most criminals ought to be executed. Some people think that way. Some people think that we should give them another chance and some people say, obviously whatever the law says. If the facts call for it and I think it's the right thing to do, I'll just do what the law says. Do you see yourself leaning one way or the other or do you see yourself down the middle?

[4390] A I don't think so. I pretty much—as growing up, I have always been called upon every now and then to settle a matter here and there and I've learned to be unbiased and just to give my opinion of things. I believe at this point that I have no bias one way or the other.

Q You understand that we have to rely, in selecting a jury here, basically on what you tell us now. I'm just being as straight with you as I possibly can. When you came down here on Monday you said that you did have some religious feelings about it and we just want to be sure that what you tell us—I'm not suggesting that you're being dishonest with us, but that you don't change your mind because we rely on what you tell us now and, if you got on the jury and said, well, I've changed my mind about that, I could never do that, you know, when it comes down to it, my religion and stuff, my moral feelings, my personal feelings, are such that I couldn't do it, then that wouldn't really be fair to us, would it? The same thing would hold true for the Defendant. If you say, well, you know—**[4391]** well, if you just change your position against him. Do you see what I'm getting at?

A Yes.

Q Now, we have to rely on what you're telling us. Do you have any reason to believe that your opinions would change between now and in the next couple of days or next week?

A No, sir. Like I say, given these few days, I've really brought it down to myself as to what would I really do. I really believe that the fair trial would the most—well, what everybody deserves and I've put aside—I still believe in what I put there, but many times you have to put aside what you believe for the sake of getting a fair trial and fair judgment.

Q Why do you think personally that some people some people ought to be executed?

A The nature of the crime, the brutality of it.

Q If they're continuously committing crimes, do you think that should enter into the decision also? In other words, if most of his life he's been committing serious crimes, do **[4392]** you think that's another reason, another factor, that should enter into your decision?

A I don't believe—immediately I think that that kind of evidence is inadmissible.

Q Well, No. If a person is charged with a crime, in the punishment phase of the trial the jury gets to learn if that person has been convicted of other serious offenses before. In other words, is this the first time he's ever done anything wrong or is he the type or person who has been violating the law all of his life or most of his life.

A If those crimes have been increasingly more and more violent, I believe that would point in that direction.

Q What sort of crimes do you think a person ought to be able to receive the death penalty for?

A Murder in the gravest circumstances, brutality and—

Q Do you feel strongly about murder?

A Yes, I do.

Q Let's talk a little bit about murder and capital murder. Murder is a

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[4452] MAX W. O'DELL

Called as a jury panel member having been duly sword by the Court to testify to the truth, the whole truth and nothing but the truth was examined and testified as follows:

EXAMINATION

BY MR. NELSON:

Q As you may remember from Monday, my name is Jim Nelson. The man seated next to me is Paul Macaluso. There will be one other attorney involved for the State of Texas in this case and his name is Norman Kinne. The three of us are assistant district attorneys in Dallas and we've been assigned by Henry Wade to handle this case for the State of Texas.

The man immediately to my left is Mr. E. Brice Cunningham.

MR. CUNNINGHAM: Good afternoon, Mr. O'Dell.

Q And seated next to him is Mr. Royce West.

MR. WEST: Mr. O'Dell, good afternoon, sir.

Q These two gentlemen are attorneys in Dallas who have been appointed by Judge

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[4454] little more relaxed in this situation than you would be talking in front of forty or fifty strangers, if anybody can be relaxed sitting up on the witness stand with four lawyers staring at you. We do hope that you will relax. Understand that there are no right or wrong answers to anything we're going to ask. Were just trying to find out how you feel about some things. If you will bear with us, it gets a little tedious at times, but everything we do is necessary under the law.

Mr. O'Dell, let me tell you just right out of the box what our position is in this case, that being the State of Texas. We are actively seeking the death penalty for Thomas Joe Miller-El. We believe we will be able to present to a jury of twelve people the type and quality of evidence to prove beyond any reasonable doubt that he is guilty of the offense of capital murder. We further believe that we will be able to present the type and quality of evidence to prove that each of three questions should be answered yes. If each of those questions is answered yes, then Judge McDowell must under the law assess a death [4455] sentence in this case and we anticipate at some point that death sentence will be carried out because we anticipate that's the way the evidence will come out. That's basically our position and what we plan to do once the trial in this case starts.

Our position doesn't make a whole lot of difference. What counts is your feelings and your position. You had a chance on Monday to fill out this questionnaire, which I've already made reference to once, and one of the questions on it was whether you believe in the death penalty. You've answered that in a little bit of detail, as a matter of fact, but I would like to ask you, if you would, to tell us in your own words, having had three or four days to sleep on it now, how you feel about the death penalty and whether it serves a purpose in our society?

A Well, I feel that it does because I think it—they say that it does act as a deterrent. I think—well, capital crimes should be punished by capital verdicts. That's the way I feel about it. I think every case should be on its own merits or dismerits or

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[4471] A I believe so.

Q Any problem with that?

A I don't see any.

Q Okay. Let me talk about something that may come up. We don't anticipate that it will, but it might so I'm going

just in case, I guess, so to speak. We've told you that this type of offense is called murder plus, murder plus a robbery. If we present our case and you hear all the facts of a murder and we prove to you a murder. We prove to you that a person knowingly or intentionally caused the death of another human being, but you don't hear a word about a robbery. There's no evidence at all that there was any robbery involved at all, then it's just a murder and we haven't proved capital murder. All we have proved is the offense of murder in the State of Texas. Am I making myself clear on that?

A Yes.

Q If that's the case, then the death penalty is no longer a potential punishment.

A But you've already stated that you're going for capital murder?

Q Right. We feel like we can prove **[4472]** capital murder, but murder is a lesser included offense of capital murder. If you were to decide beyond a reasonable doubt that he is guilty of murder, but that you have a reasonable doubt whether there was a robbery committed or not, then the law would require you to find him guilty of murder rather than capital murder.

A Does the Judge tell you what—

Q It's going to be up to you. You will get instructions as to what—

A He will define it?

Q Right. As to what murder is and what capital murder is. If you find this, this is murder and if you find this, this is capital murder and, if you have a reasonable doubt, he's not guilty and so on. You will be instructed on all of that. If you should find him guilty of murder rather than capital murder, a whole different range or punishment comes into play. No more death penalty. The range of punishment for the offense of murder in the State of Texas is from five years up to ninety-nine years or life and a fine of up to $10,000.00 is optional. You can assess it, **[4473]** but you don't have to.

The law says in order for you to be qualified and eligible to serve on this jury, you have to be able to consider that entire range of punishment. I'm going to get to that, but let me throw some more things into the pot while we're doing this. When we talk about murder in the State of Texas—I've told you basically the definition, knowingly or intentionally killing another human being. If it is self-defense, if you find self-defense, it's not murder. He's not guilty. If the jury were to find it was an accident, it's not murder and he's not guilty. If the jury were to find that the person was insane, then he is not guilty by reason of insanity and he's not convicted of murder. It could be a killing that is less than murder. If I came home and my little four year old daughter had been raped and abused and the guy that did it was standing next door with a beer in his hand and actually bragging about it and I went and got my gun and blew him off the face of the earth, the jury might decide that was a killing in the heat of passion rather than a murder. If they did, **[4474]** that would be voluntary manslaughter which is a different offense with a different range of punishment. Those are legal justifications and legal excuses for killing a person.

There may be things that enter into the murder scenario that don't amount to legal justifications or legal excuses. There may be provocation, but it's not enough that self-defense is found. You could hear about the prior relationship between the parties. You could hear if this is an on-going feud or if it's a spur of the moment thing and all the background to the offense. Would you agree with me, Mr. O'Dell, that there is probably a myriad of circumstances under which one person could kill another person?

A Definitely agree. I've had some of them. Some of them are bad drivers.

Q Okay. I suppose, if we sat here for the rest of the day, we could give you example after example after example of different situations where one person kills another person. We aren't allowed to do that under the law. We can't give you examples. We can't go into the facts of this case. Now,

[4475] you mentioned bad drivers. If something is done recklessly, one person kills another person recklessly, that's not murder either. That's involuntary manslaughter which is another type of offense.

When we talk about murder, we're talking about the knowingly or intentionally killing of another person without any legal justification and without any legal excuse. Again, there may be some provocation. There may be some probleMs. There could be all kinds of things that enter into it that don't amount to legal justifications or legal excuses.

I guess what it comes down to, the way I've heard it put, he knew he was going to kill them. He intended to kill them and he killed them for whatever reason. There could be all kinds of reasons, but that's what happened. The law says you have to be able to consider that entire range of punishment for the offense of murder. We don't ask you to tell us right now that you will give life for murder or you would give thirty years or you would give five years because you haven't heard any of the facts. As you pointed out at the **[4476]** outset, you have to hear the evidence before you would know what you would do on any case.

The law does say, after you hear all of the facts and circumstances, then you're going to have to make a decision and the law wants you to have an open mind as to that entire range of punishment as you're listening to all the facts and circumstances. You don't even have to be able to sit there right now, Mr. O'Dell, and think of a situation where you would give a life sentence or think of a situation where you would give a five year sentence, either one. As a matter of fact, the law doesn't want you to try to think up those situations because, if you did, you've almost mentally committed yourself that I have to hear this for it to be a life sentence or I have to hear this for it to be a five year sentence. There may be another case out there that you didn't think of that deserves life or that deserves five years.

What the law says basically is, you must be—the legal phrase is able to consider. What that means is, after you've heard all of the facts and circumstances, **[4477]** you've heard

everything you're going to hear about the case, the facts of the case, the defendant, everything you're going to know, if you believe after listening to all those facts and circumstances that a sentence of life and a fine of $10,000.00 is appropriate in your own mind and called for by those facts, can you give it?

A I think so, yes.

Q Let's go to the other end. Again, we're talking about knowingly or intentionally killing another person, no legal justification, no legal excuse. You've found this person guilty of murder. Once you've heard all the facts and circumstances, again everything about the offense, the facts of the case, the defendant and everything you're going to know, if you believe personally in your own mind that those facts and circumstances call for and justify a five years sentence for the offense of murder, can you give a five year sentence?

A Yes.

Q Okay. Again, you don't have to be able to sit there right now and think of what those facts and circumstances would be. We **[4478]** have people come down here and say, I can't imagine what it would be, but—one in a million maybe would be a five year case, justify a five year sentence. Then that person may be sitting down here twenty years from now on a jury and listening to a case and say, well, I never thought I'd hear it. I never thought I'd see one, but this case calls for five years and so I'm going to give five years. That's all we ask of you, Mr. O'Dell. If you hear that case, whatever it is and whatever it may take to convince you that five years is appropriate, would you give five years?

A Uh-huh.

Q The same thing on the life sentence or the ninety-nine year sentence. It probably should take an exceptional case to justify either end of the spectrum, but if you hear a case that calls for a life sentence based on the facts and circumstances, could you and would you give a life sentence?

A Yes.

Q Back to the same old phrase you've probably heard me use twenty times already and that's can you keep an open mind and listen to **[4479]** the evidence and make a decision based on the evidence that you hear?

A Yes.

Q That's all we ask you to do. That's all anybody can ask you to do.

You've probably heard about—there's been a lot of discussion about parole in the State of Texas. The law says and the Judge may instruct you that prisoners in the Texas Department of Corrections can under certain circumstances earn what is called good-time which is credit against their sentence. They can also under certain circumstances be paroled before the end of their sentence. It goes on to say that is in the exclusive jurisdiction of the Board of Pardons and Paroles and the governor of the State of Texas. You can't control it. We can't control it. Judge McDowell has no control over it. It's up to the people in Austin.

As a result of that, the law goes on to say that even though you know about that, you cannot consider that for any purpose in assessing a sentence. In other words, you can't adjust a sentence to take into account

* * * *

[4487] Q In other words, you're on a honey-do schedule, right?

A That's correct.

Q Honey, do this. Honey, do that.

A You've got it.

Q Okay. Now, I want to talk about your personal beliefs. You indicated that you're Catholic?

A That's correct.

Q If you had to describe Max O'Dell, how would you -- say I'm a prospective employer and you're applying for a job and I ask you to describe yourself in ten words or less, how would you describe yourself?

A Well, to sell myself I would say that I think I can do your organization a lot of good.

Q I would ask you why. Why could you do my organization a lot of good?

A I'd say because I am a loyal employee.

Q Now, I'm going to ask you to give

me your thoughts, your personal beliefs. Now, let me preface this question with this: There is no wrong answer. You cannot give us a wrong

* * * *

[4526] held.)

THE COURT: Mr. O'Dell, I'm sorry for sending you in and out, but we were talking a law question. The juror has been passed, Mr. Nelson. What says the State?

MR. NELSON: Your Honor, the State of Texas would be pleased to have Mr. O'Dell as a juror on this case.

THE COURT: Mr. West?

MR. WEST: We will excuse Mr. O'Dell.

THE COURT: Mr. O'Dell, you have been excused from service in this case.

Off the record, Pam.

(Whereupon, there was an off the record discussion, after which the following proceedings were held.)

MR. CUNNINGHAM: In Cause No. F85-78660-NL, State of Texas versus Thomas Joe Miller-El,

* * * *

---- INDEX REFERENCES ---

IN THE CRIMINAL DISTRICT.COURT NO. 5
OF DALLAS COUNTY, TEXAS

[Filed April 14, 1996]

CAUSE NUMBER F85-78660-NL

THE STATE OF TEXAS

v.

THOMAS JOE MILLER-EL

PRE-TRIAL HEARING

APPEARANCES:

THE HONORABLE NORMAN KINNE,
THE HONORABLE JIM NELSON
THE HONORABLE PAUL MACALUSO
Assistant District Attorneys Dallas County, Texas

[Filed November 20, 1996]

FOR THE STATE OF TEXAS

THE HONORABLE E. BRICE CUNNINGHAM

THE HONORABLE ROYCE WEST
Attorneys at Law Dallas, Texas

FOR THE DEFENDANT

BEGINNING on the 12th day of March, A.D., 1986, the above entitled and numbered cause came on for hearing, THE HONORABLE PAT MC DOWELL, Judge presiding, and the following proceedings were had, to-wit:

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[1] PROCEEDINGS

THE COURT: This is the State of Texas versus Thomas Joe Miller-El on various motions. Both sides ready?

MR. NELSON: State's ready, Your Honor.

MR. CUNNINGHAM: The Defense is ready, Your Honor.

THE COURT: I think the first thing I probably ought to take up is a motion on behalf of the Dallas Morning News filed by Mr. John McElhaney to quash the subpoenaes issued in this case. Mr. McElhaney, may I hear you? I might as well dispose of that.

MR. MCELHANEY: The motion we filed is based on the first amendment to the United States Constitution, and article1 section 8 of the Texas Constitution regarding freedom of the press. Very simply, the Motion To Quash the Subpoenaes was filed because the balance which needs to be struck between the sixth amendment right to call witnesses on the part of the criminal accused and the first amendment freedom of the press, at first blush do conflict, in the sense that the press desires not to have their time taken up in research incorporated by litigants of either side in cases in which the press is not a party. On the other hand, we realize that the accused has a right to subpoena witnesses. [2] So, that the approach used by the Courts is to balance necessary competing interests. And one of the fundamental tests under the Constitution in this area is whether there are less intrusive means on the part of the party who wants the information to obtain that same information, and if so, then the first amendment privilege carries. If not, then there's a balancing, weighing test that the Court can use. And we realize the privileges of the press are conditional privileges. Our position here, very simply and I think very correctly, is that this is a very clear case where the defendant issuing the subpoena has not satisfied the test, even prima facie, because the information sought on the face of the news article referred to in the subpoena appeared in the Sunday March 9, 1986 Dallas Morning News article; which on its face purports to be a report on a study of court [3] records. These are official court records, the Dallas Morning News had no special access to these, these are available for anybody to look at, for anybody to do their own compilation in any manner they want. So, subpoenaing a reporter in a case like this merely to rehash the work that they did in analyzing public records we think is, in fact, an abuse of the privilege. The United States Supreme Court in a case, Bransburg versus Hayes, I think has some language that very clearly illustrates the problem the press has here. That is, they said, "We do not hold that litigants are free to, quote, annex the news media as their own investigative arm." That's in effect what has happened here, the defendant has tried to annex the re-

search, and expertise, and work of the Dallas Morning News to make them his involuntary investigator. That's where the Courts, I think unanimously, are willing to draw the line as a practical matter. This article came out on Sunday, this is the very first week since then that the article has been out. We can anticipate that we could be bombarded with requests, not only [4] here in Dallas County every Monday morning for jury selection, but throughout the entire state. And the tying up of the reporters and making them involuntary experts for either side in litigation is, in fact, an interference with their news gathering efforts. Because, instead of being available to properly report news, these reporters stood by yesterday morning, in fact were here at the courthouse yesterday morning from these subpoenaes. Mr. Cunningham said, "Well, come on back tomorrow, we'll have them on stand by." So, here they are standing by being detained and diverted from their ordinary reporting duties. So, there is a direct actual impact on their abilities. That is the basis for our Motion To Quash.

THE COURT: Thank you. They are available, just not here.

MR. CUNNINGHAM: In response to the last part. First, as I told Mr. McElhaney yesterday when I arrived here shortly before 9:00 o'clock, the attorneys were under the impression that the Court would be here. The Court was not here. That is why, after I [5] talked with the Court I advised Mr. McElhaney that the Court would not be here, and that as soon as we found out what time the Court wanted to reset this matter I would notify him; which I did. I also extended to him and his clients the privilege of not being here this morning at 9:00 o'clock, but I asked him to have them on stand by. I hope that Mr. McElhaney is not arguing that reporters for newspapers are not subject to subpoenaes, because I think that he, as well as this Court, is perfectly aware that reporters, just because they are reporters, are not exempt from being subpoenaed as witnesses in a case. If this was a DWI case, his argument may have some validity, but the State has actively told this man that they are going

to seek the death penalty. So, this is the most extreme form of punishment that can be assessed on any individual under our Penal Code and under our system. As the Court well remembers, during the selection process of the twelve jurors there were constant objections and constant statements by the Counsel for Mr. Miller-El with respect and to the manner in which the [6] State was exercising some of its peremptory challenges. And it was stated at that time that it was the position of the defendant that the ten peremptory challenges that were used to strike black members of the prospective jury, in the opinion of the Defense, were done to strike them simply because of their race, in that all ten had qualified. And I think the records will reflect that ten of their fourteen strikes were used to strike black males and females who had been qualified under our system by talking with either one of—well, one side, one of each of the lawyers an the Court. I would also advise the Court that the process does not end just with us subpoenaing Mr. McGonigle and Ed Timms about the article that they wrote on Sunday, or the one they wrote on Monday, or the one they wrote on Tuesday. That is just the first step, along with other procedures, and other subpoenaes that have been issued, and other matters that will be offered into evidence on behalf of Mr. Miller-El to show the Court that, and request of the Court, that the twelve jurors that have been selected be [7] excused, and that he be allowed to proceed with the selection of another jury panel free from the taint that the present twelve has. Therefore, we submit that because of the seriousness of the charge that Mr. Miller-El stands indicted for, and jurors have been actively told that they're going to seek the death penalty, and that it is their intention. Also, I think our motion goes to the practice of whether or not there is a policy of the Dallas County District Attorney's office to exclude minorities and/or blacks from sitting on, not only felony juries, but in Mr. Miller-El's case a capital murder jury, the most serious of offenses. We submit that the articles by the Dallas Morning News, along with what we have already contended and with other material we propose offering, will all go to support our contention; at which time we

will again move to strike this jury and let us proceed in choosing another one.

THE COURT: Okay, Mr. Cunningham. Mr. McElhaney, do you want to—

MR. CUNNINGHAM: We are not concerned with McGonigle and Timm's source, we are more [8] concerned with the article they wrote, that they wrote it, and the material that they used. And we are not concerned about their source, if they think we want to know whether John Jone's or Mary Smith told them this, we're not concerned with that.

THE COURT: The material, according to what Mr. McElhaney said, doesn't it mostly come from public records? I haven't read all the article, I read some of it.

MR. CUNNINGHAM: There are various individuals, Your Honor. My understanding is that they examined four thousand four hundred thirty-four prospective jurors. And out of that number, they made a determination that ninety-two percent of the blacks were excused, roughly four hundred and five. They also indicate that they examined one hundred trials randomly.

THE COURT: All right. I am going to do this, Mr. Cunningham—I hope it is not .a disservice to anyone—because of the number of people that have many other things to do besides being here, I am going to, Mr. McElhaney, take the Dallas Morning News' [9] motion under advisement. If you will bear with me on this, at least until I hear all the testimony relating to this particular motion. Mr. Cunningham, I will let you—I notice you have other people under subpoena. I have had several contact me about schedules. I would like to have benefit of their testimony, if any, and give me a chance to look at law on the first amendment question.

MR. CUNNINGHAM: The first step to proceed with was with the news reporters, then to Judge Sparling, then to some other witnesses.

THE COURT: At this point in time, I guess I will not grant the Morning News' request, but I will not rule on it

until I have a chance to maybe hear some other witnesses and the chance to look at some of these cases and decide the motion.

MR. CUNNINGHAM: Whether the Court denies the motion or not, we'll still want McGonigle and Timms here to make a record, a Bill of Exception, to what we would have offered through these two witnesses but for the fact of the Court denying the motion.

[10] THE COURT: I want you to be able to make a Bill on it, a full Bill if necessary.

MR. CUNNINGHAM: To be able to make a Bill we are going to need them.

THE COURT: Whether or not you do it through live testimony or some other method, we can deal with—as I read your subpoena, essentially what you are concerned with is getting the articles themselves.

MR. CUNNINGHAM: The articles themselves should have a list of the cases, and four thousand names. Once we get that, we can move on from them.

THE COURT: Might get some of their source material, but they said that it is a matter of public record. Let me take this matter under advisement, unless you wish to stay. I will not permit your clients to be interviewed or questioned without your presence in Court.

MR. WEST: There is also another subpoena out for another news reporter for the Dallas Morning News, Melinda Hemper.

THE COURT: I am not aware of that subpoena, or Motion To Quash in her behalf.

[11] MR. MC ELHANEY: Your Honor, Mr. West just told me that just now, I wasn't aware of it either. I will contact her. We would like to amend our motion to include her. I understand from Mr. West it is the same grounds, same proffered reason for wanting her.

THE COURT: I don't have any problem, I want to save as much time as possible for both parties, to include any Dal-

las News reporter that participated in this particular motion. What I am saying, Mr. McElhaney, is I have not decided. Obviously, I just want a chance to hear what the motion is about. Let me look at some law and look at Bransburg, some of those cases. So, you are excused. You are welcome to stay if you want, but before I do anything I will contact you and let you know.

MR. MC ELHANEY: Thank you., Just one. matter; the Supreme Court cases in the cases in this area tend to be very lengthy. I know the Court has severe time constraints. To sum it up, I would say the xerox copy of the case opinion attached to our brief although a civil case, nevertheless, cites the rules that we **[12]** believe are also applicable here. And so, just for the Court's convenience, this opinion that is attached to the brief I think is -would give the Court the outline of our argument.

THE COURT: I appreciate the help. Mr. Cunningham, are you going to say something else?

MR. CUNNINGHAM: Since the Court was taking it under advisement I wanted to know whether or not Mr. McElhaney and his clients were going to be under the gag rule also?

THE COURT: The gag rule ran to the parties, I am not going to prevent the press from airing stories about this hearing. Does that answer your question? I was concerned the gag order was more directed at the lawyers in the case at the time than the newspapers. I am not going to do that.

MR. CUNNINGHAM: Wouldn't you consider they are now parties, having filed a motion? And they are seeking to quash their having to testify in this case and possibly any evidence being offered through them.

THE COURT: I won't extend it to them.

[13] MR. CUNNINGHAM: Well, to that extent then, we would then invoke the Rule.

THE COURT: I am going to deny that.

MR. CUNNINGHAM: The Court denied that?

THE COURT: As regards to newspaper people.

MR. CUNNINGHAM: Not newspaper people, just anybody from the Dallas Morning News: Timms, McGonigle.

THE COURT: Anyone that's been subpoenaed, I will honor the Rule on that.

MR. WEST: Your Honor, the tenor of our request to invoke the Rule is that potential witnesses not be allowed to discuss this matter with anyone else, as the Rule has been invoked in other criminal cases, same thing.

THE COURT: Now, I am ready to take up the next motion. Motion To Dismiss or To Quash the Indictment and/or Select A Separate Jury. Is that a fair summation of that? Who would you like to call on that?

MR. KINNE: Your Honor, the Court -before the Defense is allowed to call any witnesses, may I be heard with regards to this particular motion?

[14] THE COURT: Surely.

MR. KINNE: The Motion To Dismiss The Indictment, I submit that it is untimely filed pursuant to article 28.01 of the Texas Code of Criminal Procedure; number one. Number two; as I understand the motion, it prays that the Court order the selection of two juries in this case; which remedy the Court could not grant if he wanted to. And a Motion To Quash The Indictment because article 37.01 of the Texas Code of Criminal Procedure is unconstitutional. We feel that that section of the motion does not require testimony. The Court can determine at this point in time, as has previously been determined by higher Courts, that the particular article of the Code of Criminal Procedure is constitutional. Since the Court could not grant the relief prayed for by the Defense, I feel that hearing testimony on a motion which the Court could in no way grant is a waste of everybody's time; hearing things that the Court couldn't do if the Court wanted to. And, therefore, we would urge the Court to deny this particular motion.

THE COURT: Actually, I have two **[15]** motions on it, Mr. Cunningham.

MR. CUNNINGHAM: There are two motions.

MR. KINNE: I thought the Court was addressing that motion.

THE COURT: I have got one to dismiss the indictment and one to quash the indictment. Are they the same motion?

MR. CUNNINGHAM: Separate motions.

MR. KINNE: I thought the Court said we are going to take up the Motion To Quash The Indictment and Be Allowed To Select a Separate Jury.

THE COURT: Tell me what you want.

MR. KINNE: With regard to the Motion To Quash The Indictment For Systematic Exclusion Of Classes From The General Venire, again Your Honor, this motion is most certainly untimely filed pursuant to article 28.01 of the Code of Criminal Procedure. And again, the Court has previously ruled on the Defense's motion with regards to the selection of the jury, with regards to quashing this particular jury. The remedy prayed for by the Defense is that the Court quash the indictment should the Court find that classes of people **[16]** have been excluded from the jury; which again, the Court would have no authority or jurisdiction to quash an indictment returned by a Grand Jury based upon those grounds even if the Court should find there was any truth to it whatsoever. And we feel, again, that we are wasting time on a useless matter that the Court couldn't grant if he wanted to. And if they have objections to the composition of the jury, certainly, they can make motions subsequent to trial and protect the record in that manner. We submit that the Court could not grant the motion, and that it is made for a delay of time and for possible political motivations. We would urge the Court to deny both motions at this time.

THE COURT: Mr. Cunningham, do you want to reply?

MR. CUNNINGHAM: Your Honor, I am getting tired of hearing about political motivations.

MR. KINNE: I don't care what you are getting tired of.

MR. CUNNINGHAM: I did not interrupt Mr. Kinne when he was making his speech of gobbledy **[17]** gook and nothing.

MR. KINNE: Object to Mr. Cunningham's interpretation of gobbledygook and nothing. I didn't insult him.

MR. CUNNINGHAM: Mr. Kinne knows I am not running for office, my concern is Thomas Joe Miller-El, the man to my immediate left, that the State has said they are actively seeking the death penalty on. Anything within the rules of criminal procedure or the penal code that I can do to protect Mr. Miller-El's rights, I am going to do whether Mr. Kinne likes it or not.

MR. KINNE: Excuse me, Your Honor, I would like to object to Mr. Cunningham's statement. If he wants to respond to me that's fine, but if he wants to quarrel with me I have to object to it at this point in time.

MR. CUNNINGHAM: I am addressing myself to the Motion To Quash The Indictment Based on the Systematic Exclusion Of Classes From General Venire. The prayer prays that the jury be quashed and that a new jury be selected to try the case, free of violations **[18]** of the sixth amendment right. He prays for such other, further relief, on the premises that this Court may deem proper. There is nothing in the prayer about quashing the indictment.

THE COURT: All right. I took that maybe—that was my question, Mr. Cunningham. I asked this question because assuming that, you know, if you can prove the allegations to the motion I don't think the Court has any more power under that theory of law to quash the indictment because, maybe the jury, but not the indictment. Is that what you are saying?

MR. CUNNINGHAM: I am attacking the jury, the twelve that have been seated, that we say are tainted by the use of the State having used its peremptory strikes in a discriminatory manner by striking ten blacks that were qualified, ten of their fourteen strikes being for blacks. That's

what we are concerned with that the Court can still address itself to.

THE COURT: Go ahead.

MR. CUNNINGHAM: Because if the Court **[19]** finds, after a hearing based upon the evidence, that if that occurred then the Court has the power to say that this jury selected has been tainted, therefore, I am going to dismiss this jury and start picking a new one. That's what we are asking for.

THE COURT: Okay, I am with you.

MR. CUNNINGHAM: That's what we want offer evidence on.

THE COURT: Mr. Kinne, I think you may have answered that, so we narrow—I think the only issue I really have in front of me is whether or not they would be entitled to have an evidentiary hearing on the Motion To Quash The Jury that's been selected and sworn individually, at least at this point in time, on the basis of some sort of racial exclusion, or however you want to characterize it. I don't have any authority to grant a Motion To Quash The Indictment at this point in time. We had extensive pre-trial before the trial started on both motions, so—or motions I should say. But on this one, Mr. Kinne, is—what is your position about the Defense being allowed to bring a defense, if it has any, to **[20]** show that the State has some sort—

MR. CUNNINGHAM: While he is looking at it; the Court when we had the other pre-trial also told counsel for Mr. Miller-El that we would have the opportunity to file any other motions and you would rule on it.

THE COURT: I think the time to quash the indictment, though, I think that was a misheading; I will treat it like that. I am not going to quash the indictment based on impropriety in the jury selection, if there was any. Mr. Kinne, on the question they raised about alleging the State in some form or fashion was discriminatory in jury selection, I don't see any—How do you answer that?

MR. KINNE: I'm sorry, I was thrown off by Mr. Cunningham's motion, which is entitled Motion To Quash Indictment, but prays for some other relief with regards—I believe the Court has already ruled on the composition of the jury. And, again, the witnesses that have been subpoenaed by the Defense, as far as I know, had nothing to do with the selection of this jury for the State of Texas or for the **[21]** Defense. I fail to see how Judges sitting in other courts and some former Assistant District Attorneys who were in the District Attorney's office many years ago—And, again, none of these people have had anything to do with the selection of the jury in this case, since the people who had anything to do with the selection of the jury have been here before the Court for the last five weeks; that being the Defense Counsel, Mr. Nelson, Mr. Macaluso and myself. None of the witnesses they have subpoenaed had anything whatsoever to do with the selection of the jury. And we submit that, again, this testimony with regards to what may have happened somewhere else in some other case has nothing to do with the selection of the jury in this case. And we would further urge the Court that this is merely for delay. That the State has at great expense brought witnesses in, from not only out of town but out of state, in anticipation that we would be proceeding to trial in this matter. And we feel that the Court has already ruled on the composition of the jury, and we would urge the Court to deny the motion **[22]** and proceed to trial.

THE COURT: Mr. Cunningham, I am prepared to rule on your motion, but I think I can note something if the lawyers disagree on something. Of course, both sides agreed to excuse certain jurors in voir dire because of the way we agreed to conduct voir dire. Some excused by agreement were blacks, some others were not. Of course, I think the record will show on voir dire, which has been conducted in five weeks as individual jurors were challenged or struck, that the Court—it wasn't necessarily the Court, I guess the lawyers themselves usually made a record of the race of the juror. And the State, as I recall, on every single strike where it was challenged by the Defense they stated to the

satisfaction of the Court at least, that the reason for striking a particular juror was not racially motivated. That is already in the record. What you are proposing to do is go beyond that?

MR. CUNNINGHAM: Yes, sir.

THE COURT: To show what?

MR. CUNNINGHAM: One; to show there was **[23]** a practice and procedure in the District Attorney's office dealing with the striking of minorities, and particularly blacks. That there was printed material, and that that material exists and has existed for a long period of time, possibly up even till now. And that the strikes that were used in this case were a carrying out and a continuation of the policy that was set out in that guideline or instruction to fellow—well, to prosecutors on how to select jurors and who t keep off juries.

THE COURT: Mr. Kinne, I am going to let the Defense try to support its motion. I can't pre-rule on it, but I want the record—maybe I am wrong, but I want the record as clean as possible. If it goes up, I don't want some Court back down the line to conduct a hearing post-trial, I had rather have the record be complete. So, if there is a viable issue here to be judged properly on appeal, Mr. Cunningham; I don't want to make this, as you might well suspect, a long matter because I just happen to know some of the people that have been subpoenaed are trial Judges in this **[24]** courthouse and other people. They all have busy schedules, but I am going to stop talking and ask you to call your witnesses.

MR. CUNNINGHAM: Call Judge John Sparling.

THE COURT: We'll limit this to issues in the motion. I don't want you to get off track.

MR. CUNNINGHAM: May we approach the Bench, Your Honor? (The following proceedings were held at the side of the Bench.)

MR. CUNNINGHAM: You said you didn't want us to get off track, I don't know what you mean by getting off

track. My motion is—my concern is Miller-El's rights and to have a fair and impartial trial.

THE COURT: That's all I am concerned with.

MR. CUNNINGHAM: If any of his Constitutional Rights are involved I am going to do everything I can to protect them. The Court said "get off track," I don't know what **[25]** you are talking about, I need to know.

THE COURT: Stay within the outline of the motion, what this witness may or may not know in support of the motion. Do we have more witnesses?

MR. WEST: Before we go back outside, I think for record purposes; if for any particular reason that any party in this case thinks this is politically motivated, I will withdraw as attorney in this particular case.

THE COURT: The Court doesn't think that.

MR. CUNNINGHAM: It is being said.

THE COURT: Well, I hope not.

MR. KINNE: And I will say it again.

THE COURT: On the record. Go ahead, Mr. Cunningham. (The following proceedings were held in open court.)

JOHN SPARLING,

the witness, having been duly cautioned and sworn to tell the truth, the whole truth and nothing but the truth, testified on his oath as follows:

[26] DIRECT EXAMINATION

BY MR. CUNNINGHAM:

Q. State your name.

A. John Sparling.

Q. And what is your occupation or profession?

A. I am an attorney.

Q. And how long have you been practicing?

A. Nineteen years, approximately.

Q. You are a former Court of Appeals Judge?

A. That's correct.

Q. And you resigned a month or so ago?

A. About two months ago; that's correct.

Q. Were you ever employed by the Dallas District Attorney's office?

A. I was.

Q. When were you first employed by the Dallas County District Attorney's office?

A. February 1st, 1968.

Q. And would you kind of tell me what positions or jobs you had with the Dallas County District Attorney's office?

A. Well, I was hired as an Assistant District Attorney. I was assigned to Judge Gutherie's misdemeanor **[27]** court as most trial—most prosecutors assigned to the trial division. I started out as third man in misdemeanor court, and went to second man, and headed up misdemeanor court.

I was promoted to a felony court, and was in two or three different felony courts, and eventually became Chief Prosecutor of a felony court.

I then helped establish what was then called the impact program, which was a—which were monies that were given by the Federal Government to the City of Dallas, and in turn were given to the County of Dallas in order to create sort of visiting courtrooms to combat crime on the streets. Subsequent to that, or during that period of time, I moved from one court to another trying a variety of different cases.

In 1973, I helped write a grant called the Specialized Crime Division and started a unit called. the. Specialized Crime Division. And I remained head of that division until September 1981, at which time I left the Dallas County District Attorney's office.

Q. While with the Dallas County District Attorney's office, did you have an occasion to write an article entitled Jury Selection In A Criminal Case?

A. I am not entirely sure that I put that title on it, but that's how it is known today. Yes, I wrote it.

[28] Q. Do you remember what title you put on it when you wrote it, if any?

A. I believe it was untitled.

Q. Would you tell me who asked—well, first of all, did someone ask you to write the article?

A. Yes.

Q. Would you tell me who asked you to write the article?

A. I wish I could remember. I know it was not Henry Wade, and I don't recall who it was, but I know that it was someone higher in the District Attorney's office than was I.

Q. In other words, someone higher than you, but less than Mr. Wade himself?

A. I would have remembered it if it had been Wade, and it wasn't.

Q. As a result of one—well, strike that. Would the person that asked you to write this article have been your superior?

A. Sure.

Q. As a result of one of your superiors asking you to write the article, you did so; is that correct?

A. I did.

Q. Okay. Did the person that asked you to write the article give you any ideas of what he wanted in the **[29]** article pertaining to jury selection?

A. No. You call it an article, and I might want to—

Q. What would you call it?

A. Well, it began as a handout. That was back—way back then there were Saturday morning sessions where some of the felony prosecutors would lecture some of the misdemeanor prosecutors. And I was asked to speak on jury selection, and I was told about a week prior to the time that I was to give my talk that I had to have a handout. So, I think one Sunday afternoon, or one afternoon, I recall, at

home I sat down and wrote out the document that you probably are holding in your hand today.

Q. Now, this handout as you called it, who was it distributed to?

A. It was at that time given to misdemeanor prosecutors in the Dallas County District Attorney's office .

Q. Can you tell me when you first prepared this handout?

A. It was in 1969.

Q. Okay. And was it was a handout that was subsequently given to felony prosecutors?

A. I can—Whether it was given to felony prosecutors I don't know. Let me say this; that I had no **[30]** great pride of authorship, I did it because I had to. I didn't want to do it at the time simply because it meant more trouble. I was not paid to do it, and I did not do it on the District Attorney's time. I pretty much lost track of it until it became an item.

Q. Did the hand out of handbook that you wrote become a subsequent part of a larger manual?

A. Yes.

Q. So, that the handout that you wrote, not on the District Attorney's time but was given at out at least to misdemeanor prosecutors, was subsequently included as a part of a larger manual for persons employed by the Dallas County District Attorney's office?

A. I didn't—As a matter of fact, it was included in a statewide manual for criminal defense lawyers with a notation that it added something to jurisprudence.

MR. CUNNINGHAM: May I approach the witness, Your Honor?

THE COURT: Surely.

(An item was marked as Defendant's Exhibit No. 1 for the purposes of identification.)

Q. Judge Sparling, I show you what's been marked **[31]** as Defendant's Exhibit No. 1. And I'll ask you whether or not—well, have you had an opportunity to look at that?

A. Well, let me—I have had a chance to—Let it this way: I have not looked at it to make sure each page was stapled in sequence, it starts at page 301 and ends on page 318; it appears to be.

Q. The handout that you prepared that is now a part of a much larger manual?

A. I don't know what it is today.

Q. All you know, probably—

A. I do not—I do not think it is part of anything that is currently circulated to anybody today.

MR. CUNNINGHAM: Offer Defendant's Exhibit 1.

MR. KINNE: We'll object that Judge Sparling's article written in 1969 is hardly relevant on material on a jury selection here in March of 1986.

THE COURT: I am going to overrule, not that particular objection. I am going to let it remain part of this record and I am going to determine its relevancy, if any.

Q. (By Mr. Cunningham) Judge Sparling, would you tell me whether or not there are any remarks contained in **[32]** your article that you wrote, that was handed out as a handbook to prosecutors, with respect to how they should handle prospective minority jurors?

A. Yes, I said—Now, your question is slight multifarious. Understand, I did not hand this out; I didn't include this in this manual; nor did I cause its publication. I wrote it one Sunday afternoon and handed it to about fifteen misdemeanor prosecutors.

Q. The manual you wrote one Sunday afternoon in 1969, did it shed any light or give information to prospective prosecutors of what action, if any, they should take with respect to minority jurors; specifically black jurors?

A. I don't see—I am not sure that I ever used the word black, and I am not sure I ever picked out blacks in this thing.

Q. Did you use the word minority?

A. I did use the word minority. I understand you have one man on your jury which would be a minority, wouldn't it?

Q. Maybe. Which one?

A. I'm sorry, what?

Q. Which one?

A. (No response indicated.)

Q. Would you tell the Court what your thinking **[33]** was in 1969 when you wrote the article and passed out the handout with respect to minorities serving on juries?

MR. KINNE: Again, we'll object to what this witness' opinion was in 1969 as being irrelevant and immaterial to this hearing.

MR. CUNNINGHAM: I think I will connect it up, Your Honor.

THE COURT: Go ahead.

A. All I can do is read what I wrote as to what to look for. "You are not looking for any member of a minority group which may subject him to oppression." I meant oppression by the State. "They almost always empathize with the accused." In that same vein, somewhere over here I said—remember, this is 1969.

Q. Uh-huh.

A. I say someplace else in there that minorities tend to empathize with the accused, probably say it twice.

Q. Now, you left the Dallas County District. Attorney's office in what year?

A. In 1981.

Q. Okay. Do you know whether or not there were any updates or any changes in that particular jury selection handout from '69 when you wrote it up until '81?

A. No, I don't.

[34] Q. Okay. And you are not saying that there were not any changes or updates, or whether or not they left it as you wrote it?

A. I don't know. All I know is that it was placed in a manual, and at my request I believe it was taken out.

Q. When you left in 1981, were any of those manuals still in the D.A.'s office and still being used, either by misdemeanor or felony prosecutors?

A. I can't answer that, I don't know.

Q. Is it your belief that the handout that you wrote in 1969, that the reasoning behind that handout has not changed?

A. Well, I think the handout is terribly out of date.

Q. That's not—it may be termed out of date, but are you saying that the underlying reasoning with respect to the selection of juries has not changed from what you wrote in 1969?

A. The reasoning? In what respect, can you be more specific? The underlying reasoning is you don't want to take anybody on a jury, if you are a prosecutor, unless you have—unless you believe that he will convict. That's the underlying reasoning of the entire paper. That has not changed since 1969.

[35] Q. Would a further extension of that be that minorities, because they—you believe they empathize with the defendant, would not convict?

A. No, and I never said that they would not; I said they often empathize with the accused.

Q. Okay.

A. And I am not going to let you back me into any kind of situation that it says or implies systematic exclusion of any group of people was advocated.

Q. Well, what I am concerned with now is whether or not you have said that the paper's underlying reasoning hasn't changed from when you wrote it in '69 to right now, as of February 28, 1986?

A. Is that a question?

Q. Yes, sir.

A. The underlying reasoning of the article on jury selection was to try to select, or actually more accurately, to try to eliminate those persons from your jury that you do not believe will convict, using peremptory challenges.

Q. When you make the statement that you are not looking for a member of a minority group which may subject him to oppression; what type of oppression are you talking about?

A. Well, my attitude was that, in 1969, that **[36]** there were certain, either groups of people that may either actually be, or perceive themselves as being oppressed by the state, being discriminated against. The thought being: If they were, in fact, discriminated against, and if they had, in fact, been oppressed by the state, normally they might take it out against the State. In 1969 things—our world has changed drastically since 1969. I don't need to tell you that. But there was a lot going on in 1969 that is not going on in 1981 or 1986.

Q. So, you are saying that if a minority felt that he had been oppressed by the system, then he was not—or you should not look for that type of person on the jury.

A. Let's say that if a white Anglo-Saxon male felt he had been oppressed by the system, you wouldn't want him either.

Q. But I don't see where you said that you are not looking for any member of a white Anglo-Saxon male who had been oppressed, you said minority.

A. That's right and—is that a question?

Q. Yes, sir.

A. Yes, I did say minority. I mean, you are reading it. am delighted to have you read it if you want.

Q. I am still trying to find out what you mean **[37]** when you say "subject him in oppression". Who's going to oppress him—

A. If you don't understand it, a great lawyer like you, I am not sure anybody else could have understood it either. That would make it pretty meaningless.

Q. I don't think it would be pretty meaningless. Probably somebody could interpret it any way they wanted, like in the District Attorney's office.

MR. KINNE: Excuse me, Your Honor, is that a question?

MR. CUNNINGHAM: It is a comment.

MR. KINNE: Could we have a question and not just a conversation between Mr. Cunningham and Mr. Sparling?

THE COURT: Let's move on. Anything else, Mr. Cunningham?

MR. CUNNINGHAM: Just a minute, Your Honor.

Q. (By Mr. Cunningham) Judge Sparling, you are aware that the Civil Rights Act of—well, the Civil Rights Act was passed in 1964?

A. Which one?

Q. The first one.

A. There's a Civil Rights Act of 1983. There are, oh, a whole bunch of them.

[38] Q. The Civil Rights Act of 1964.

A. I can't agree with you that was the first one, Mr. Cunningham.

Q. Was there a Civil Rights Act passed in 1964?

A. I don't know.

Q. When you wrote your article five years later and you referred to the word "minority group," what minority groups were you speaking of?

A. I don't recall.

Q. You had no particular minority group in mind?

A. I think any group that felt that they had been as a group oppressed against. And don't ask me to, seventeen years later, to try to interpret it.

Q. Were you talking about Negroes? Were you talking about Mexican-Americans in '69? I don't think we had any Vietnamese here. All that—were you primarily talking about Negroes and Mexican-Americans in 1969 when you referred to minorities?

A. No, I don't think I was, primarily.

Q. When you talk about race, were you referring to Negroes or Mexican-Americans?

A. I am not sure that's what was in my mind. I understand, you know—

Q. Well, let me read it. It says race, "Minority races almost always empathize with the defendant." Were **[39]** you talking about Negroes, Mexican-Americans?

A. Possibly, yes.

Q. Were there any Negroes in the District Attorney's office in 1969 when you wrote the article?

A. I don't even remember.

Q. What about Mexican-Americans?

A. Yes.

Q. Do you remember what his name was?

A. I think Sef Dominques was a prosecutor then.

Q. Do you know the names of any white prosecutors who were in the District Attorney's office, at the time that you wrote the article, that are still there? Was Norman Kinne there?

A. No, I don't think so,

Q. What about Paul Macaluso?

A. No. I'm sorry, I am not sure when they came to the District Attorney's office. I know that I was there before they were.

Q. Did either Paul Macaluso or Norm Kinne ever serve under your supervision?

A. No.

MR. CUNNINGHAM: Pass the juror. I mean, pass the witness.

THE COURT: Mr. Kinne, any questions?

MR. KINNE: Yes, sir.

[40] CROSS EXAMINATION

BY MR. KINNE:

Q. Mr.—excuse me. Judge Sparling, in 19—let's see, you came to work for the D.A.'s office in February of 1968. In 1969, when this article was written, do you recall what your position was in the D.A.'s office at that time?

A. I do not recall exactly, I was not one of the heavyweights.

Q. I presume—were you in felony court?

A. Yes, I was.

Q. All right. And this paper was primarily written for misdemeanor prosecutors?

A. Yes, sir.

Q. Misdemeanor prosecutors don't try death penalty offenses, do they?

A. No.

Q. Didn't in 1969?

A. No, that was not directed to anything, it was not directed to any capital-type offense.

Q. This paper that Mr. Cunningham has put into evidence then, the quotations that he has asked you about, were never intended to apply to jury selection in a capital **[41]** offense; is that correct?

A. No. That's correct.

Q. In 1969, or from the time that you went to work with the District Attorney's office from 1968 to 1981, was there ever a systematic exclusion of individuals because they belonged to a particular race, religion or minority?

A. No.

Q. Did you ever teach that, or did you ever hear anybody in the D.A.'s office teaching that?

A. No.

Q. You indicated that things have changed since 1969, and I believe you have partially explained that; is there anything else that you would like to say about that?

A. Well, just simply that, just to point out the fact that times do change, people change and ideas change. And what was the—what I may have believed to be the contemporary wisdom of the day is not necessarily the contemporary wisdom of today. And I would be delighted if everybody would put that paper in the context of 1969, which is the time it was written.

Q. Just a couple of final questions. Judge, let me ask you: Did you have anything whatsoever to do with the selection of the jury in this particular case?

A. Not a thing.

[42] MR. KINNE: I believe that's all.

REDIRECT EXAMINATION

BY MR. CUNNINGHAM:

Q. Judge Sparling, you indicated that this was written for misdemeanor prosecutors.

A. Yes.

Q. And after you had written it and you had given it out to the misdemeanor prosecutors, I believe you said that it was subsequently incorporated in a manual for prosecutors?

A. Uh-huh, that's correct.

Q. Was the manual limited to misdemeanor prosecutors only? Yes or no, sir.

A. There may be a third answer, which is I don't know.

Q. Okay. Are you saying you don't know?

A. Yeah, that's what I am saying. I had absolutely nothing to do with the placing of that article in a manual. Nobody asked me about it, nobody asked my approval of it, it was done. And I don't blame the person that did it, it was just done.

Q. Let me see if this is correct: You were directed by one of your superiors to write the article?

[43] A. As a handout; that's correct.

Q. As a handout it was handed out initially to misdemeanor prosecutors?

A. That's correct.

Q. And after that someone thought that the article was well written enough, or contained the thoughts of the office, or at least the superiors who asked you to write it, that it was incorporated in a manual?

MR. KINNE: We'll object to what someone else may have thought, Your Honor.

THE COURT: I will sustain the objection to that particular question, Mr. Cunningham.

Q. (By Mr. Cunningham) As a result of your having written the article it was incorporated in a manual by someone else; is that correct, sir? .

A. That's correct.

Q. And as it is incorporated in the manual it is referred to as "Jury Selection In A Criminal Case"; is that correct, sir, as it is entitled here starting on page 301?

A. That's your exhibit, if it is in evidence. If that's what it says, that's what it says.

Q. Okay, sir. You also told Mr. Kinne there has been no systematic exclusion of either classes or minorities from juries in Dallas County?

[44] A. That's correct.

Q. And you base that upon what, sir?

A. On my thirteen, almost thirteen years experience in the District Attorney's office, knowing other District Attorneys and watching them pick juries, hearing them talk.

Q Let me see, you say you spent thirteen years in the District Attorneys office; how many capital murder cases did you try?

A. Thirteen, eleven, somewhere in there; eleven, thirteen.

Q. Out of those eleven or thirteen capital murder cases that you tried, how many blacks was on either one, or two, or all eleven or thirteen?

A. I just don't have any idea, but I would be surprised if there were not blacks on all of them.

Q. Do you know the names of any of them? Can you give us the names of any of the cases?

A. I can give you the names of some of the defendants let me ask you—do you want the names of some of the jurors, the black jurors?

Q. No, the defendants, I want the names of defendants because then I can go to the files and I can find out whether or not there were black jurors on those juries.

[45] A. Well, I have—I mean, I have somewhere the files on the cases that I am in reference to, but I don't have all the names in my head. But I am not sure, really, what you are driving at.

Q. Well, you have made the statement that there has been no systematic exclusion of minorities from juries, and particularly capital murder juries. I think you said that on all of yours there were one or more blacks and I want to see it.

A. I think I said I would be surprised if there were not one or more blacks on all of them.

Q. In other words, one?

A. Brice, I do not remember some of the names. Some—if some of the people I tried for death and got it walked through that door right now, I am not sure I would recognize them. And you are asking me to go back eighteen years, or seventeen years, and try to tell you how many blacks were on the jury, what the makeup was. It wasn't that big a deal. If there was a black on the jury, I wasn't—it was not a remarkable event, therefore, I don't remember it.

Q. Do you know Stauffer?

A. Sure.

Q. Was he an Assistant District Attorney in the District Attorney's office while you were there?

[46] A. Yes.

Q. Did he come after you, or before you?

A. Before.

Q. And was he still in the District Attorney's office when you left?

A. No.

Q. Okay. Prior to the—you said John came before you or after you?

A. He came before I did.

Q. Have you—do you know whether or not Stauffer was the first felony prosecutor that put a black on a capital murder case?

A. No, I don't.

Q. I believe you said the reason that you know there is no systematic exclusion is; one, you didn't do it. Is that what you are saying?

A. Absolutely.

Q. And then other prosecutors told you that they did not?

A. Well, yes, other prosecutors have told me that; that's correct.

Q. Are there any other means by which you can say that there were no exclusions of minorities from participating in felony juries, and particularly capital murder juries, other than your experience and what other **[47]** prosecutors told you?

A. In other words, can I testify to something other than what I have seen and what I know? I cannot.

Q. Were you ever—well, did any prosecutor ever indicate to you that he did not want blacks on felony juries or capital murder juries?

A. No.

MR. CUNNINGHAM: That's all, Your Honor.

THE COURT: Mr. Kinne, anything else?

MR. KINNE: Yes, sir.

RECROSS EXAMINATION

BY MR. KINNE:

Q. Just for the record, Judge Sparling, you are presently a Republican candidate for District Attorney; is that correct?

A. Very much so.

Q. One of the Defense Attorneys over here, Mr. West, Royce West, is a Democratic candidate for District Attorney; is that correct?

A. As I understand it very much so.

MR. WEST: Your Honor, as I have told **[48]** the Court, Mr. Kinne and the whole world: If Mr. Kinne or anyone else thinks this is politically motivated, I will withdraw from this particular case. The paramount—I am sitting in as a second to Mr. Cunningham—is the Constitutional rights of Thomas Joe Miller-El.

THE COURT: Anything else?

MR. WEST: Judge, do you want to rule on my Motion To Withdraw?

THE COURT: Oh, that is a motion?

MR. WEST: That's the motion. If the Court or anyone else thinks this is a political grandstand as opposed to safeguarding this man's rights, then I will withdraw from this particular case. I will now tender—

THE COURT: No one asked that you withdraw from the case, I am not going to ask you to. If that's a motion on your behalf, I deny it. The Court always presumes the lawyers do whatever they do for the benefit of their respective sides, excluding exercising peremptory challenges. By the way, is there anything else?

[49] MR. KINNE: No further questions.

THE COURT: Mr. Cunningham, is the witness excused?

(A document was marked as Defendant's Exhibit No. 2 for the purposes of identification.)

FURTHER REDIRECT EXAMINATION

BY MR. CUNNINGHAM:

Q. Judge Sparling, I show you what's been marked as Defendant's Exhibit No. 2, and direct your attention to what purports to be a quote with respect to Defendant's Exhibit No. 1. I will ask you whether or not that quote was made by you?

A. Yeah, I anticipated this probably less than 5 minutes ago. The paper's underlying reasoning has not changed. The underlying reasoning is: Do not take a juror that cannot convict.

MR. CUNNINGHAM: I offer Defendant's No. 2.

(A document was marked as Defendant's Exhibit No. 3 for the purposes of **[50]** identification.)

MR. KINNE: On the basis of one line which Mr.—which the witness has said that he said the underlying reasoning hasn't changed, we'll object to Defendant's Exhibit No. 2, in that it contains a great deal more than that; which is hearsay as far as we are concerned.

THE COURT: I will admit that particular part of that article.

Q. Defendant's Exhibit No. 3, I think which contains your picture and remarks made by you. Well, first of all, is your picture shown on page 28A of the Dallas Morning News, March 9, 1986.

A. Sure is.

Q. Does it contain remarks made by you pertaining to he jury selection process in Dallas County, and particularly with respect to Defendant's Exhibit No. 2 and—I mean, No. 1?

A. The—it contains statements made by me to a newspaper reporter.

Q. Okay. Those statements were accurately contained in the paper as you told the newspaper reporter; is that correct?

[51] A. Yes. Are you—maybe nobody else knows what we are talking about. But do you and I agree we are talking about the statements underneath the picture?

Q. Yeah, and also let me find your remarks.

MR. KINNE: Excuse me, Your Honor. I believe if he has some statement and he would like to ask the Judge if he made that statement, I think that would be the evidence. If the Judge says that he said it, then says it now, then that's the evidence.

THE COURT: I believe that's correct, Mr. Kinne. Go ahead, Mr. Cunningham.

A. Right. Would you repeat your question again, please?

Q. There are statements contained on 28A which would be, I don't know, about the fifteenth or twentieth paragraph down, refers to a speech by you, and it goes on for about three or four paragraphs. Is that correct?

A. That's correct.

Q. Was that accurately—were those statements made by you?

A. Yes, they were.

MR. CUNNINGHAM: I offer Defendant's Exhibit No. 3.

[52] THE COURT: Same objection, Mr. Kinne?

MR. KINNE: We'll, yes, sir, he is offering what appears to be a whole newspaper. The Judge has identified a few lines, I take it, of what he said.

THE COURT: Again, I am not sure what purpose it serves, but I will admit that portion of the article which Judge Sparling—

MR. KINNE: He said—but he didn't say it was inconsistent with what he's testified to today. How are we to know what part that is?

MR. CUNNINGHAM: I will point that out for him, Your Honor. Oh, you want to know right this minute?

THE COURT: Get it in the record.

MR. KINNE: May I have the witness on voir dire, Your Honor?

THE COURT: Go ahead.

VOIR DIRE EXAMINATION

BY MR. KINNE:

Q. Judge, is the part that you and Mr. Cunningham [53] were having a somewhat confidential conversation about; would you mind reading the part that has been attributed to you, that you say that you did say to the newspapers?

A. Yes. It says, "Sparling, now a Republican candidate for District Attorney, said his speech merely reiterated, quote, the conventional wisdom of the times. He no longer believes the guidelines are valid." Quote, "I do not see there's a good reason, and I don't think there has ever been a good reason, to exclude blacks," Sparling said last week.

MR. CUNNINGHAM: Judge, I think two paragraphs above that, that you did not read and Mr. Kinne did not ask you to read; would you read those two also?

MR. KINNE: If that's what you said. I don't want him reading some part of the newspapers, I am interested in what in the heck he's offered into evidence. I asked the Judge what part of that newspaper he agrees he said.

CONTINUED REDIRECT EXAMINATION

BY MR. CUNNINGHAM:

Q. Would you agree you said the two paragraphs I [54] was just talking to, immediately above the two that you just read?

A. Said to the newspaper reporter?

Q. The speech by then Assistant District Attorney John Sparling.

A. That is contained in your Defense Exhibit there.

Q. Go ahead, because the next down it is—

A. The only thing I said that is not already in evidence is what I just read.

Q. Well, Mr. Sparling asked you to read two paragraphs.

A. Mr. Kinne.

Q. I'm sorry, Mr. Kinne asked you to read the two bottom paragraphs, I want you to read the two immediately before then, which are concerned with remarks made by you about the issue that we have been talking about.

A. "The speech by then Assistant District Attorney John Sparling noted that minorities, quote, almost always empathize with the accused, therefore, do not make good jurors for the prosecution." Let me back up to—for a minute. I did not say, "Therefore, do not make good jurors for the prosecution." I said, quote, "Almost always empathize with the accused," close quote. That's the extent of what I said.

[55] Q. In other words, you are saying that you did not tell the reporter, "Therefore, do not make good jurors for the prosecution"?

A. I did not tell the reporter that.

Q. The next paragraph.

A. Quote, "You are not looking for a fair juror," that's in quotes, Sparling advised. And there's, quote, "Rather a strong bias sometimes in a hypocritical individual who believes defendants are different from them in kind rather than degree," close quote.

Q. That was your belief as of probably March 7 or March 8, 1986, when you made that statement to the reporter?

A. No, Mr. Cunningham, I think you are confused, they took that out of the jury selection paper that is on your counsel table. that was written in 1969.

Q. Okay.

A. What I said to the reporter was the first thing I said in answer to Mr. Kinne's question; that the conventional wisdom of the time that—that the speech merely reiterated the conventional wisdom of the time, and that I don't see there's any good reason, there's never been any good reason to systematically exclude blacks. That's what I said in 1986.

Q. When did you make this statement?

[56] MR. KINNE: Which statement?

Q. Okay. You are not looking for a fair juror?

A. I said that in 1969.

Q. Anyone reading article would not know that you said that in 1969; is that correct?

A. But I can't be held accountable for that, Mr. Cunningham.

Q. Just being honest and fair, if someone picked up this paper tomorrow and read that statement they would not know that you are talking about something that you wrote back in 1969? Isn't that true, sir?

A. I couldn't—I can't speak to what a reader of the newspapers is going to assume or not assume. But understand, when we talk about a fair juror, that was not a comment that a fair juror couldn't be had. A fair jury, a fair juror and fair juries come out in the wash, that was the sentence's meaning behind that in 1969.

Q. I get the impression from what you said that you advised that you were looking for a strong, biased, sometimes hypocritical individual who believes that defendants are different from them in kind rather than degree.

A. From the perspective of a prosecutor trying to convict, that's correct.

MR. CUNNINGHAM: That's all, Your **[57]** Honor.

THE COURT: Anything else, Mr. Kinne?

MR. KINNE: That's all.

THE COURT: Thank you, Judge, you will be excused.

Mr. Cunningham, do you have anybody here right now? I am going to work as long as possible, but my reporter might rest her fingers for a few moments. Do you have somebody to testify right now?

MR. CUNNINGHAM: We asked Judge Hampton to come down.

THE COURT: Is he not outside the room? Mr. Cunningham, who will you have next?

MR. CUNNINGHAM: The Honorable Jack Hampton.

THE COURT: Okay, Judge Hampton.

JACK HAMPTON,

having been sworn as a witness to tell the truth, the whole truth, and nothing but the truth, testified on his oath as follows:

DIRECT EXAMINATION

[58] BY MR. CUNNINGHAM:

Q. Go ahead, state your name.

A. Jack Hampton.

Q. And are you employed, sir?

A. Yes, sir.

Q. Where are you employed?

A. Judge of the 283rd District Court.

Q. How long have you been employed as the Judge of the 283rd Judicial District Court of Dallas County, Texas?

A. Since June 1st 1981.

Q. Prior to June 1st 1981, were you engaged in private practice?

A. I was, yeah.

Q. How long were you engaged in private practice?

A. Nineteen years.

Q. Before going out in private practice were you employed by anyone else?

A. I was employed by Henry Wade, District Attorney, for five years.

Q. And can you briefly recall what jobs you held; i.e., whether or not--I assume you started in misdemeanor court?

A. Yes, I did.

[59] Q. Okay. Did you work your way up from the misdemeanor court?

A. I did, uh-huh.

Q. What was the highest, I guess, rank that you attained while in the District Attorney's office? Did you make felony prosecutor?

A. I was a felony prosecutor in the Criminal District Courts for two years, 19—last of 1960 through the first half of '62. And I guess—well, now it would be called the number two position is what I had.

Q. I will ask you whether or not, while you were serving as a felony prosecutor, you were ever reprimanded by the District Attorney of Dallas County, Texas because you had allowed a black woman to serve as a juror.

A. I was not a felony prosecutor at that time I was misdemeanor.

Q. Misdemeanor?

A. A misdemeanor prosecutor.

Q. That's even—well, were you ever reprimanded by the District Attorney of Dallas County, Texas for allowing a black woman to serve as a misdemeanor juror on a misdemeanor drunken driving case?

A. Either Mr.—the District Attorney or his first assistant, James K. Allen, at the time.

Q. So, either Mr. Wade or the number one first [60] assistant James K. Allen reprimanded you for having put a black female on a misdemeanor DWI jury?

A. That's true.

Q. Was anything said to you by either Mr. Allen or Mr. Wade about what would happen if you ever put another black on a jury?

A. My recollection is that I would be fired if I did that again.

Q. Did you ever put any—from 1958 through 1962 did you ever put any black, a male or female, on any of your misdemeanor juries or any of your felony juries.

A. Not unless I just ran out of strikes. I could have run out of strikes, but I am not—I don't recall ever having done it; in answer to your question.

Q. In other words, if there were blacks who were in the number that the jury would come out of, say the first thirty-two, and there were blacks in that number, you invariably used your peremptory strikes to strike those blacks? Do you follow my question? Let me back up.

A. Okay.

Q. Say that in 1962, before you left the District Attorney's office you were a felony prosecutor, if at that time you were selecting a jury on a felony case and the panel had qualified, and you knew—you then knew that the **[61]** jury came out of the first thirty-two, your ten strikes plus the Defense's ten strikes.

A. Right.

Q. If there were one or more blacks in the first thirty-two, what do you do as a felony prosecutor for Henry Wade?

A. We usually got them off, used the peremptory challenges.

Q. Do you know whether or not other felony prosecutors—let me back up. Do you know whether or not other misdemeanor prosecutors were doing the same thing that you were doing with respect to getting blacks off of juries when you were in misdemeanor courts?

A. I think we all handled it about the same way, we didn't talk much about it, but from observation that is what happened.

Q. Would the same be true with respect to getting blacks off of felony juries for the couple of years that you were in felony court?

A. The same would be true.

Q. And when a black did not—was not challenged for cause and that cause was sustained, the only other way that you got that black juror off was to peremptorily challenge him?

A. That's the only way.

[62] Q. Do you know whether or not—well, you were in private practice from 1962 through 1981, I will ask you whether or not you had occasions to try any criminal cases during that period of time, sir?

A. Many, many criminal cases.

Q. And can you give us a rough idea of how many criminal cases, felony criminal cases, you may have tried from 1962 through 1981?

A. I just don't know. You know, I tried four or five a year, at least; I guess maybe eighty to a hundred, something like that.

Q. Out of that eighty to a hundred estimation, can you give us an idea of how many black jurors, if any, were actually seated as a part of the jury of the case that you were trying?

A. I just don't have any recollection about that, if there were. There may have been some, but I just can't recall.

Q. Would the number have been small.

A. It would have been small.

Q. Considerably small?

A. Probably, yeah.

Now, you have been on the Bench since '81 through the—

MR. CUNNINGHAM: Pass the witness.

[63] THE COURT: Mr. Kinne, any questions, sir?

MR. KINNE: Yes, sir.

CROSS EXAMINATION

BY MR. KINNE:

Q. Judge, with regards to your being reprimanded about putting a black juror on a misdemeanor panel, you don't now recall whether it was Mr. Wade or James K. Allen?

A. No, I am not sure.

Q. Okay. You were quoted, I believe, in the newspapers as saying Mr. Wade reprimanded you.

A. Yeah, that's—that is the way the quote came out. I probably told Mr. McGonigle it was Mr. Wade. And I have thought about it since, and I am just not sure at this point which one it was, it was a long time ago.

Q. Okay. Are you saying—as I recall the story, it indicated that this one particular juror hung up the jury; is that right?

A. That's right. I remember the trial very clearly, it was as a young prosecutor. The first two or three cases you remember almost personally, I do remember that, uh-huh.

Q. All right. Was—certainly, James Allen **[64]** wasn't trying misdemeanor DWI's?

A. No, none of them were in the court. They were not in the court.

Q. All right. And you recall specifically that he reprimanded you for putting a person on there who was black, or that you put a person on there who hung up the jury?

A. My recollection is it was because I had put a black on there who had hung the jury.

Q. Now, you said that you, as I understand your testimony, that you think that the other prosecutors handled it that way but that you all didn't talk about it?

A. We didn't discuss it much, there may have been some discussion about it. But just from observation when I was working with other prosecutors that's the way we handled the jury selection process.

Q. From your observation?

A. From my observation, yeah.

Q. I take it, then, that you're not telling us that even in 1962 it was the policy of the District Attorney's office to exclude people from juries solely because of their race?

A. I can't say that, huh-uh.

Q. All right. When you were a defense attorney for nineteen years, did you make—you tried criminal **[65]** cases, did you not?

A. Yes, frequently.

Q. And when you selected jurors, as representing the defendant, did you make an effort to put minority people on your jury, as a defense lawyer?

A. I didn't—I mean, I used my peremptory challenges on people I deemed to be State jurors. I assumed the State tried to get the minorities off, that was always—

Q. You would have liked to have had minority representation?

A. Sure, and may have gotten some, I just don't recall any specific cases at this time.

Q. When you walked into a courtroom and you saw the jury panel, is it fair to say that you perked up a bit when you saw numerous minority people on that panel?

A. That's fair to say. That's true.

Q. Because you stood a good possibility of getting these minority people on the jury; is that correct?

A. That's true.

Q. Why would you want them on the jury?

A. Well, I always felt like I had a better chance for acquittal if I had a minority on the panel.

Q. Would you agree with the statement, then, that minorities, certain minorities, tend to empathize with the **[66]** defendant?

A. I would agree with that sometimes. It is not as true now as it used to be, but at the time that I was trying cases I felt that was true.

Q. Of course, you approached the jurors on an individual basis?

A. True.

Q. Is that correct?

A. That's true.

Q. There are certain occupations, for example, that you as a defense attorney or as a prosecutor, just taking an occupation, that you want to approach with caution because certain occupations have a tendency to either be more State's minded or more defense minded?

A. That's true, uh-huh.

Q. From the Defense's point of view, probably, you would approach a North Dallas banker with a great deal of caution as a juror?

A. As a defense lawyer you would want to get them off.

Q. Okay. As a prosecutor, a social worker, probably you want to get them off.

A. That's true.

Q. Is it fair to say, then, that these are all general categories, they aren't set rules, "we are going to **[67]** strike all physicians; we are going to strike all North Dallas bankers; we are going to strike all blacks, all Mexicans, all Orientals," simply because they happen to fit in that category. But they do have a tendency, probably, to empathize with one side or the other, but you are going to approach them with caution?

A. That's right, as a general rule; there are exceptions in every case.

Q. Now, when a defense attorney or a prosecutor says, "What we want is a fair and impartial jury," when talking about jury selection; that's not true, is it?

A. I have never found it to be true, both sides are trying to win the case.

Q. That's right; they're both trying to win. In your experience as both a defense attorney and as a prosecutor, as a prosecutor you want the people on there who are the most prone to convict. Isn't that fair?

A. That's always been my understanding.

Q. As a defense attorney you want people who have more of a tendency to empathize with the defendant, or more prone to not convict?

A. I think that's a defense lawyer's job to do that.

Q. As a result of that, each side having peremptory challenges, the State strikes the people they **[68]** think are the weakest and the Defense strikes the people they think are the strongest. And as a result, you get twelve fair and impartial jurors. Isn't that about right?

A. That's my understanding of how the system is supposed to work, yeah.

Q. Thank you very much.

THE COURT: Mr. Cunningham?

REDIRECT EXAMINATION

BY MR. CUNNINGHAM:

Q. Mr.—I mean Judge Hampton, I am going to give you some statistics about a person, and would you tell me whether or not you think that person would be more State's minded or Defense minded: An individual who is employed by the U.S. Postal Services—

MR. KINNE: Excuse me. Your Honor, I don't believe that the Judge is qualified as an expert. I feel that is irrelevant and immaterial to the motion that they have; who the Judge would select as a juror as either a prosecutor or a defense attorney, since he had nothing to do with the jury selection in this case and did not make policy with regards to the selection **[69]** of juries in the D.A.'s office.

MR. CUNNINGHAM: Your Honor, I suggest it was opened up by Mr. Kinne's question to him when he asked him about the types of prospective jurors, or prospective

persons, that the State would want and that the defendant would want.

THE COURT: I am going to sustain the objection. I think we can probably ask any of these witnesses how they would do something. We all know jury selection has a lot to do with matters such as eye contact and other matters that occur only between the lawyer and the witness. And this witness, even if he were an expert, and he may well be, a description of a hypothetical juror is not relevant to the motion.

MR. CUNNINGHAM: What I was concerned with was whether or not that type of person, from what he said, would be the type of person he would have wanted while he was a prosecutor, or the type of person he would have wanted when he was a defense counsel.

[70] THE COURT: I am going to sustain the objection only because I suspect this witness could be asked a thousand hypothetical questions. I think we can extend this hearing unnecessarily I understand what you are trying to do and I agree to your approach, but I don't think it is relevant. I will sustain the objection

MR. CUNNINGHAM: Your Honor, note our exception.

Q. (By Mr. Cunningham) Judge Hampton, back when you were told by either Mr. Wade or Mr. Allen that—the incident involving the black female. The statement was not made to you that, "If you put another black female on jury and it hangs up you are fired." That wasn't the statement made to you, was it, sir?

A. No, it is not exactly what it was.

Q. In fact, was the statement made to you, quote "If you ever put another nigger on a jury you are fired?"

A I don't recall the word nigger being used, but it was black probably, but that's the way I recall it.

Q. You understand that back in 1958 through '62 we were not referring to ourselves as black then, that is of recent vogue?

[71] A. I didn't know that, I'm sorry.

Q. I think you indicated—well, back in '58 to '62 is when you were in the District Attorney's office. I think you told Mr. Kinne that when you were in private practice, that if you walked in and saw a panel and you saw minorities that your eyes kind of gleemed. Would you expand on that, why you—I guess, why you felt your eyes gleemed, or why you felt that, or something?

A. Well, you certainly hoped to get minorities on the jury. If you were going to have them on the jury you would have to have enough on the panel so the State could not strike them all. If you had more than ten in the first thirty-two then you had a pretty good shot at getting one on the jury panel. That's why you would be happy about it as a defense lawyer.

Q. Would it also be fair to say that when you walked in, and after you got through examining the panel if there were five in the first thirty-two, you knew what was going to happen to those five? Or you felt sure you knew what was going to happen to those five?

A. You could be pretty sure what was going to happen.

Q. After everybody struck their list what you were pretty sure of had actually happened, those five had been struck. Is that correct, sir?

[72] A. That was usually the case. I am not going to say invariably, but usually, uh-huh.

Q. Thank you, Judge Hampton.

THE COURT: Mr. Kinne?

MR. KINNE: That's all. Thank you.

THE COURT: You can be excused.

LARRY BARAKA,

having been sworn as a witness to tell the truth, the whole truth and nothing but the truth, testified on his oath as follows:

DIRECT EXAMINATION

BY MR. WEST:

Q. Judge, please state your name.

A. Larry Baraka.

Q. And you are the Judge of Criminal District Court No. 2 here in Dallas County; is that correct?

A. Correct.

Q. How long have you been employed as a Judge there, sir?

A. I—oh, I guess it would be about a year and a couple of months.

Q. Now, how long have you been licensed to **[73]** practice law?

A. Since 1976.

Q. And did you graduate from the University of—

A. Houston, uh-huh.

Q. Upon graduation, did you get a job, or get—become employed by the Dallas County District Attorney's office?

A. Correct.

Q. Okay. When you came to the office, would you please the tell the Court the number of assistants, if you recall, that were in the office?

A. The number of Assistant D.A.'s? Would you—I don't know, ninety. I don't know.

Q. How many black assistants?

A. Myself.

Q. You were the only black assistant?

A. Uh-huh.

Q. Okay. Is it also true that you were the first black to be promoted to the Criminal District Courts, felony courts?

A. Correct.

Q. Do you recall the year that was?

A. Probably '78.

Q. How long did you stay with the District Attorney's office, sir.

[74] A. A little—a little less than two years, probably about short of two months, maybe. I don't know.

Q. Now, while working with the D.A.'s office, did you have occasion to participate in and observe many jury trials?

A. Yes.

Q. Do you have any observations concerning the ethnic composition of those cases?

A. You mean the voir dire panel, or jury panel itself?

Q. The jury panel itself.

A. Specifically?

Q. As far as ethnic composition; black, white et cetera.

A. Well, on occasion there were blacks on the jury. If you mean in terms of did I see more white juries or juries with blacks than what—

Q. Yes, sir.

A. I tended to see more white juries.

Q. Well, as a Criminal District Judge have you had occasion to talk with prosecutors, and exclude prosecutors from your court as a result of systematically excluding blacks?

A. Well, I only had one occasion where I excluded prosecutor from conducting voir dire in my court.

[75] Q. Would you tell the Court the reason that you did that?

A. Well, from observing the voir dire and listening to the responses of the voir dire panel, and seeing about, I guess, maybe ten blacks struck; in my mind I didn't see a just cause for it and my perception was they did it because they were black.

Q. You say "they did it," who did it?

A. The prosecutor.

Q. The prosecutor. And that prosecutor was barred from your court; is that correct?

A. Correct. Well, not barred from my court. He and I worked out an understanding: He could try cases in my

court any time he wanted to. I just advised him that if he chose to practice law in terms of picking juries in the manner that he chose to do, that he could not do it in my court.

Q. Judge Baraka, on Sunday March 9, 1986 you were quoted in the Dallas Morning News by a couple of Morning News reporters. One of the quotes, I will ask you, was it an accurate quote? "I am in shock—and you were quoted in an article dealing with Race Bias Pervades Jury Selection. You were quoted as saying, "I am in shock, I thought things had gotten a lot better but apparently they haven't." Is that an accurate quote?

[76] A. Yes.

Q. What did you mean when you said that, sir?

A. Well, I thought things had improved considerably, from my observations at least, from I would say, at least, 1980. Even in private practice I tended to see blacks sitting on juries more often than I had on previous occasions. Oh, I kind of figured to a degree that that practice, or that systematic practice of excluding blacks had somehow cut down, and as more prosecutors were coming in the attitude was changing.

Q. Do you have an opinion as the to whether or not there's been a systematic exclusion of blacks by the State from juries?

A. I would say in the past, yes.

Q. What is that opinion based on?

A. Observation.

Q. That observation—those observations are based on your experience?

A. I said as a prosecutor having tried cases and as a defense lawyer, and I guess being up here now in terms of watching trials being conducted and voir dire.

Q. That's a very honest answer, isn't it, judge?

A. As honest as I can be.

Q. Is it an accurate quote that you indicated blacks have been so conditioned to be discriminated against **[77]** in

the judicial system that many do not consider jury service as a possibility.

A. From conversations I have had with people. It's been told to me on numerous occasions, of their having been instructed to appear and very few actually believe they will be chosen. That, again, is isolated from the people I talk to, so. . . .

Q. About your opinion: Is there—has there been systematic exclusion of blacks from jury panels by the State? Is that correct; that's based on your past observation as a prosecutor, and as a defense attorney and as a Judge?

A. Past experience, yes.

Q. Okay. Would you tell the Judge—you alluded to the fact earlier that you had a conversation with a prosecutor about what you believed to be systematic exclusion of blacks. Would you tell Judge McDonell when that occurred, what year it occurred?

A. Oh, it occurred last year, I don't really remember.

Q. Not the new year, but in 1985?

A. 1985.

Q. Thank you, Judge.

MR. WEST: No further questions.

THE COURT: Cross examination?

[78] CROSS EXAMINATION

BY MR. KINNE

Q. Judge, when you say systematic exclusion, are you talking about systematic exclusion by individual prosecutors?

A. Yes, individual prosecutors.

Q. Is it not a fact, that in the District Attorney's office there are—Of course, certain hints are given to you as a new lawyer as to how to pick a jury, what to look for in individuals that you put on a jury; is that correct?

A. True. Sometimes, it is not even a question of someone telling you to do this or to do that. You come in and you

just watch people, you give them credit for being more experienced and you just follow their lead.

Q. Okay. And I take it what you are saying, then, is there are individuals that you have worked with in the D.A.'s office who systematically excluded, in this case blacks, from juries?

A. Correct.

Q. You are not telling us that was the policy of the District Attorney's office?

A. Quite honestly, in terms of actual policy for **[79]** instance, where Henry Wade says, "This is what you will do," I honestly can say I never had that happen. But, again, it was so pervasive that on one occasion when I was in the D.A.'s office, that blacks were excluded, and I suggested to the people I was working with I didn't want that to happen anymore. And, quite honestly, it never happened again, to me or—Again, no one even approached me or approached me on that topic. I didn't get any reaction in the sense no one came down on me, or told me I was crazy for wanting to do that. So, I think it was more question of the person handling the cases, themselves, to a degree. But, once again, they're learning from other people though.

Q. You apparently had people working with you that you felt systematically had excluded blacks, and you told them not to do that?

A. I don't think it was even a question of thinking. In the instance that it happened they told me that they did it for that reason.

Q. But you told them don't do that, and as far as you are concerned they quit?

A. I know it never happened again, either if I led the case or picked a jury, blacks were on the juries.

Q. Anybody ever tell you while you were Assistant District Attorney, "Don't put blacks on the jury?"

[80] A. Never.

Q. Incidentally, these prosecutors that you are talking about, that you have reference to; you know of course myself, and Mr. Macaques and Mr. Nelson. Are any of the three of us any of the people you are talking about?

A. I never had any experience working with you guys at all?

Q. All right. Thank you, Judge.

REDIRECT EXAMINATION

BY MR. WEST:

Q. Judge, let's talk about policy, oral and written policy. Do you recall being in the D.A.'s office, in your early years in the D.A.'s office, the oral policy about mustaches?

A. Yes.

Q. Would you tell the Court about that oral policy and some of the exemptions from that policy?

A. Well, quite honestly—

MR. KINNE: Excuse me. Is there a motion having to do with mustaches? If there's not I fail to see—

THE COURT: If there is I am in trouble. I will have to disqualify. **[81]**

A. That wasn't a policy either, that was an individual who had that attitude, that was not a policy of the office because I wore a mustache.

THE COURT: If that was an objection, Mr. Kinne, I am going to sustain it. What does this have to do with—

MR. WEST: Well, Judge, talking about policy. Policy can be written policy or oral policy, we need to explore the types of policy that were handed down.

THE COURT: Mr. West, I am hard pressed to relate that to the motion. I think the motion in hand is very viable and substantial, the one having to do with racial bias. If Mr. Wade had a policy about mustaches I don't see what that relates to in this case.

MR. WEST: Note my exception, Judge.

THE COURT: If it relates to what Judge Baraka's impression was regarding jury selection, I think it is fine, but I think it is probably carrying this far afield. I will sustain the objection.

MR. WEST: Note my exception.

THE COURT: Go ahead.

[82] Q. (By Mr. West) Judge Baraka, did you ever have an occasion to read the handout, or parts of a particular manual dealing with the exclusion of minorities from juries?

A. Yeah, I have seen a manual such as that.

Q. When you were in the District Attorney's office did you see it?

A Correct.

Q. And you joined the D.A.'s office in 1978?

A. '76.

Q. '76. Was that a manual used by new prosecutors?

A. It is a manual that is given to prosecutors who have attended a particular course or seminar; generally, they were new prosecutors, misdemeanors. That's correct.

Q. In 1976?

A. No. I didn't actually go until 1977.

Q. To the D.A.'s office?

A. No, into the courts. The 1976 manual, to the best of my recollection, was the last manual with the particular section you are regarding with race biases. And the manual that I got in 1977, if I am not mistaken, I don't think that was in it.

Q. But those manuals were still available? **[83]**

A. Well, yeah, I saw it. I have seen the '76 manual.

Q. What year did you leave the D.A.'s office?

A. '78.

Q. When you left in 1978, was the manual still widely circulated?

A. Honest to goodness, I don't know, in terms of the '76 manual. I don't know.

MR. WEST: No further questions.

MR. KINNE: That's all.

RALPH TAIT,

having been sworn as a witness to tell the truth, the whole truth, and nothing but the truth, testified on his oath as follows:

DIRECT EXAMINATION

BY MR. WEST:

Q. Sir, would you please state your name.

A. Ralph Tait.

Q. And how are you employed?

A. As the Chief Public Defender for Dallas County.

Q. How long have you been so employed? **[84]**

A. Since November of 1983.

Q I'm sorry?

A. November of 1983.

Q. Now, what are the basic jobs and responsibilities of the Chief Public Defender of Dallas County?

A. I direct the activities of attorneys that are assigned to four felony courts. and two misdemeanor courts to represent indigents charged with misdemeanor and felony crimes in Dallas County.

Q. Now, you were quoted in an article that appeared in the Dallas Morning News, that appeared Sunday, March 9, 1986. The subject was, you routinely warn black clients that juries are widely composed of mostly white housewives and red-necks from the suburbs who have very little contact with them; is that correct?

A. That's correct.

Q. Now, what did you base that statement on, sir?

A. That was based on my observation of twenty years of law practice in Dallas County.

Q. Twenty years of law practice and your observations in that twenty years of law practice. Was that as a defense lawyer or a combination of other experiences?

A. No, mostly as a defense lawyer. I spent two **[85]** years as a prosecutor but—

Q. I'm sorry.

A. I spent two years as a prosecutor, but not really based on that experience.

Q. What years were you in the D.A.'s office?

A. 1966 through '68.

Q. '66 through?

A. Through '68.

Q. Okay. Now, would you tell the Court your experiences in the—First of all, were you in misdemeanors and also a felony prosecutor?

A. I was a misdemeanor prosecutor.

Q. Would you tell the Court, based on your experiences as a misdemeanor prosecutor, whether there was any type of unwritten rule concerning excluding blacks?

A. My recollection from those years was that we had, unlike what Boyd's done now, there was no school, or training, or handbook. And we pretty much learned from the lawyers in the court with us. And I recall no office policy as far as excluding blacks. Now, some attorneys felt that was very—some D.A's felt that was very important, but in '66 through '68 you did not see many black people on jury panels.

Q. You said some D.A's thought that was very important? **[86]**

A. Back then, yes.

Q. What do you mean when you say "thought it was very important"?

A. It was important to exclude blacks from juries.

Q. Okay. Was that carried out during those particular year, blacks being excluded from the jury?

A. I can't speak for the whole office, and again I cannot recall trials that I was specifically in where—I can recall no trial that I was specifically in that I was asked, or told to do that, from my D.A.'s experience. That's why I say my experience from the D.A.'s office had very little to do with what I said to reporter about what our clients will face.

Q. Okay. So, your experience in private practice—

A. Yes.

Q. —were the basis of your statement in the paper?

A. Yes.

Q. Would you relate to the Court your experiences in private as to blacks serving on juries?

A. It is my experience, after approximately eighteen years of doing Defense work, that in very few cases will a black juror remain, will actually be on the **[87]** jury, will make it through the panel and come on a jury.

Q. And more often than not, would it be a fair statement to say, nine out of ten blacks are going to be struck by the State, based on your experience?

A. In the cases that I am—I have been involved in, in either picking a jury or trying the case myself, have—I can never recall a case in which either I, or a lawyer associated with me in the defense trial, struck a black juror. And in very few of the two-hundred and fifty or so jury trials I have been involved in, in probably less than fifteen or twenty, was there ever a black juror that was—that served on a jury.

Q. Now, is the reason that you didn't strike the jurors because you just assumed that the State was going to do it?

A. In deciding who we were going to strike, either I or the lawyer I had been working with, we have many times made the assumption that the State would strike the black and Hispanic jurors.

Q. Why did you make that assumption?

A. Experience.

Q. Experience?

A. Yes, seeing it occur—

MR. WEST: No further questions.

A. —over an eighteen year period.

[88] Q. (By Mr. West) One other question. You are talking about both misdemeanor and in felony court cases?

A. Well, I would say more criminal felony than misdemeanor court because of the number of strikes.

Q. Based on experience?

A. Yes.

THE COURT: Mr. Kinne, any questions by the State.

CROSS EXAMINATION

BY MR. KINNE:

Q. Mr. Tait, you indicated that while you were an Assistant District Attorney, as far as you were concerned, there was no policy in the District Attorney's office with regard to excluding any minority from the jury simply because of their race or religion?

A. My recollection of that period, '66 through '68, was: I can say that I was never told that that was required to be done or that was office policy. There were some lawyers who felt it was best to be done, and I considered that to be their prerogative, or how they felt about it.

Q. Those lawyers that you are talking about; of course, you know myself, you know Mr. Macaluso and Mr. [89] Nelson. Are any of us one of those lawyers?

A. You were not in the office by the time I left.

Q. All right. So, I take it the answer to the question is no?

A. That's correct.

Q. When you say that you assumed that the State would strike minority members of the jury; is that simply because they were a member of some minority, or because they had a tendency to empathize with the defendant, or not be strong and law enforcement minded like the State would like?

A. I cannot testify as to why another lawyer would strike someone, I merely tell you that my observation has been that those black jurors who are qualified and who make it into the last thirty-two, that very few of those serve. Now, as to why they're struck, I couldn't tell you.

Q. But even going as far back as to when you were in the D.A.'s office, I think you have told us that you picked juries and you put members of minorities, including blacks, on juries; is that correct?

A. I do not recall. And, again, my recollection of that period, '66 to '68, was that we saw very few minori jurors in the panel.

Q. Okay.

A. I do not recall specifically striking or [90] putting them on, or anything, from that period of 1966 to '68 that I was involved in.

Q. You don't know whether you struck any minorities, or you didn't, or you don't recall?

A. I don't recall.

Q. It was not policy, at any rate.

A. The—if it was policy, it was not known to me.

Q. Nobody ever told you, "If you put a black juror on there you are fired?"

A. That's correct.

MR. KINNE: That's all. Thank you.

THE COURT: Anything else?

MR. WEST: That's all.

(An off the record discussion was held out of the hearing of the court reporter.)

[91] NORMAN KINNE,

having been sworn as a witness to tell the truth, the whole truth and nothing but the truth, testified on his oath as follows:

DIRECT EXAMINATION

BY MR. CUNNINGHAM:

Q. State your name.

A. Norman Kinne.

Q. How are you employed?

A. I am an Assistant District Attorney in Dallas County, Texas.

Q. How long have you been employed as an Assistant District Attorney for Dallas County, Texas?

A. Fourteen years four and a half months.

Q. And have you served both in misdemeanor and felony courts?

A. Yes, sir.

Q. I will ask you—I will ask you whether or not you are referred to now as the Chief Felony Prosecutor?

A. I—yes, sir.

Q. And you are the prosecutor that will put on the testimony in the case styled the State of Texas versus Thomas Joe Miller-El?

[92] A. Yes, sir.

Q. I will ask you, Mr. Kinne, how many capital murder cases have you tried?

A. Eleven or twelve.

Q. And that's over your fourteen to—over your fourteen year—

A. Yes, sir.

Q. —time that you have been in the D.A.'s office?

A. Well, that includes one before I came to the D.A.'s office, when I represented—

Q. As a defense counsel?

A. Defense Counsel, yes, sir.

Q. So, you have got one as a defense counsel?

A. Yes, sir.

Q. The one where you were the defense counsel, were there any blacks on that jury, the final jury?

A. I don't recall. I know there was one Latin or Hispanic female, I remember that.

Q. On the one you tried as a defense counsel, were there any blacks on that jury, the final jury?

A. Yes, sir.

Q. You do not recall any black male or female on that jury?

A. I just don't recall right now.

Q. How many—did you try any capital murders [93] during the year of 1985?

A. '85? No, sir.

Q. Last year?

A. No, sir.

Q. What about '84.

A. Yes, sir, I believe so.

Q. How many did you try in '84?

A. It is kind of hard for me to keep track of them by years, but I think we tried two.

Q. Were any blacks on those?

A. I don't recall.

Q. Were there any black jurors finally selected to sit in the two cases that you think you tried in 1984?

A. Mr. Cunningham, I don't keep track of how many blacks, or whites, or reds, or yellows are on a jury. I don't remember.

Q. Do you recall a black being on any of the eleven or twelve juries, capital murder juries, that you have tried?

A. Yes, sir.

Q. Yes, sir, you, do recall some, or you don't recall some?

A. Sure, I recall some, yes, sir.

Q. Tell me when was the first time you put one on a capital murder jury.

[94] A. I can't tell you, but I know there have been blacks on most of the cases I have tried.

Q. Do you know the names of the last—do you know the names of the capital murder cases that you tried?

A. I recall some of them, I don't recall all of them.

A. Those that you recall, would you give me the names?

A. David Wayne McKay, Harold Joe Lane, Tommy Mann. Some of those I assisted in, you understand.

Q. Okay, I understand that. When you say assisted, that would have meant you would have been in the jury selection process and someone else was putting on the evidence?

A. Yes, sir.

Q. Go ahead.

A. John Fearance.

Q. How do you spell Fearance?

A. F-e-a-r-a-n-c-e. I just can't recall any of the other names right now.

Q. Do you remember whose court David Wayne McKay was in?

A. I believe it was Judge Chapman, I am not positive.

Q. What about Harold Joe Lane?

[95] A. I think that was Judge Meier, I believe.

Q. Tommy Mann?

A. Judge Chapman.

Q. And John Fearance?

A. I think that was Judge Mead at the time, I believe.

Q. Those are all that you can think of right now?

A. Those are all the names I can recall right now.

MR. CUNNINGHAM: That's all, Your Honor.

THE COURT: Mr. Macaluso, any questions?

MR. MACALUSO: No questions.

THE COURT: Do you have anybody here now?

PAUL MACALUSO,

having been sworn as a witness to tell the truth, the whole truth and nothing but the truth, testified on his oath as follows:

DIRECT EXAMINATION

BY MR. CUNNINGHAM:

[96] Q. State your name, please.

A. Paul Macaluso.

Q. And are you employed, sir?

A. Yes, sir?

Q. Where are you employed?

A. Dallas County District Attorney's office.

Q. How long have you been so employed?

A. Thirteen years.

Q. And you have been—have you worked in both misdemeanor and felony courts?

A. Yes, sir.

Q. And what position do you hold now with the Dallas County District Attorney's office?

A. I am the chief prosecutor assigned to Judge Loving's court.

Q. That's the 282nd?

A. Yes, sir.

Q. How many—I will ask you whether or not you have had an occasion to try, either as the one that put on the evidence, or as one of the two Assistant D.A.s that picked the jury, any capital murder cases?

A. Yes, I have.

Q. Can you tell the Court, approximately, the approximate number of cases, of capital murder cases, that you have participated in?

[97] A. Eight to ten, twelve, somewhere along there.

Q. Have there been any where you were the one that was putting on evidence?

A. No.

Q. In other words, all of yours, all of your eight to ten to twelve, would have been in the process of selecting the jury and making the determination of how the peremptory strikes should be used?

A. Yes, sir.

Q. Do you recall the names of any of the cases that you have participated in?

A. Yes, sir.

Q. Would you tell me what they are, sir; and if you remember, the court also?

A. Danny Lee Barber in Judge Zimmermann's court in 1980, I believe. Howie Ray Robinson in 1977 or '78, I don't recall which.

Q. Whose court was that in?

A. That was in Judge Mays' court. David Wayne McKay, I believe that was in Judge Chapman's court. Montoya was the last name, that was in Judge Loving's court.

Q. The 291st?

A. 282nd.

Q. 282nd.

[98] A. And Ronald Curtis Chambers.

Q. Ronald Curtis Chambers?

A. Yes, sir. And—

Q. Whose court?

A. Judge Maloney's court.

Q. Okay.

A. There are some others I have participated in, others I filled in and assisted in other cases.

Q. Do you recall whether or not there were any blacks that were actually selected to sit as a juror in Danny Lee Barber's case?

THE COURT: Which case, Danny—

MR. CUNNINGHAM: Danny Lee Barber.

A. I don't recall.

Q. What about Howie Ray Robinson?

A. Yes, sir, I do recall there was.

Q. Sir?

A. What was your question again?

Q. Was a black selected to sit as a juror in Howie Ray Robinson?

A. Yes, sir, there was.

Q. There was one?

A. Yes, sir.

Q. What about David McKay?

A. There may have been, but I just don't recall. [99] Oh, I left out—I remember some other cases now. I can think of some others.

Q. Is McKay—you don't know.

A. I don't recall; that's right.

Q. What about Montoya?

A. I think there was, but I am not sure.

Q. You are not sure? I will put a question mark.

A. I am pretty sure there was, though.

Q. What about Ronald Chambers?

A. No, I don't think there was.

Q. You said you remember some other cases?

A. James Edward Nolan.

Q. James who?

A. James Edward Nolan. That was in Judge Mays' court.

Q. Judge Mead?

A. Mays.

Q. Any blacks on the jury?

A. Yes, sir.

Q. Finally selected?

A. I think there were.

Q. How many?

A. A couple.

Q. Do you remember any other cases?

A. I am sure there are two or three, four other **[100]** cases that I participated in, but not from start to finish.

Q. What about Bobby Joe Daniel; did you participate in that one?

A. I don't think so, that doesn't ring a bell.

Q. Michael Wayne Evans?

A. No.

Q. Stanley Keith, to the best of your recollection?

A. No.

MR. CUNNINGHAM: Pass the witness.

THE COURT: Mr. Kinne, any questions?

MR. KINNE: No questions.

THE COURT: That's it, Mr. Macaluso. Do you want to call Mr. Nelson to the stand?

MR. CUNNINGHAM: That's all for right now; Judge.

THE COURT: Ready to go?

MR. WEST: We are ready to proceed.

HAROLD ENTZ,

having been sworn as a witness to tell the truth, the whole truth and nothing but the truth, testified on his oath as follows:

[101] DIRECT EXAMINATION

BY MR. WEST:

Q. Would you please state your name.

A. My name is Harold Entz.

Q. What is your profession?

A. I am Judge of County Criminal Court No. 4 in Dallas.

Q. How long have you been Judge of County Criminal Court No. 4?

A. Twelve and a half years.

Q. Twelve and a half years? Prior to becoming a Judge in that particular court, did you hold any other type of employment?

A. Private practice immediately prior to that. And prior to that, I was a prosecutor in the Dallas District Attorney's office.

Q. What years were you a prosecutor in the Dallas County District Attorney's office?

A. '67 through '69.

Q. Now, while in the Dallas County District Attorney's office did you have occasion to practice in both county and district court?

A. I did.

Q. Now, could you tell the Court whether or not **[102]** you had any, during the period of your practice in the District Attorney's office—and I assume that you did try cases?

A. I did.

Q. Did you ever have any blacks on your jury?

A. Yes.

Q. Okay. Did you ever know of any type of policy to exclude blacks from juries?

A. I did not.

Q. Did you have occasion to, while in the District Attorney's office, read any type of handout that was prepared by John Sparling?

A. No.

Q. Okay. Now—

A. Unless—I believe the article about which you make reference was written after I left the District Attorney's office.

Q. And you entered into private practice?

A. That article was written in '77?

Q. I think '69.

A. No, I was not aware of that. I was not aware of that article till later.

Q. While in private practice did you have occasion to try both county, and misdemeanor, and felony cases?

[103] A. I did.

Q. Do you recall any trials during that period what period of time are we talking about here?

A. I was appointed June 18, 1973.

Q. From the period of '70 to '73, do you recall any juries where the State—strike that. Do you recall any juries where you had blacks on them?

A. Mr. West, I can't recall one way or the other, to be perfectly candid with you. I just don't remember.

Q. Okay. Now, as a Judge for the past twelve years, have you had occasions where the State would seek to, change the composition of a jury panel?

A. I have.

Q. Would you—

MR. CUNNINGHAM: What did he say?

MR. WEST: "I have."

Q. (By Mr. West) Would you elaborate on that, sir?

A. Mr. West, it was within the past three or four years, the State made a request to shuffle the jury. This was about the time when numerous Dallas County cases were being reversed for the refusal of the Judge to permit a shuffle. Being well aware of those appellate opinions I granted the State's request. And while the process of the shuffle was being completed, the State volunteered the **[104]** information that they requested a shuffle because a predominant number of the first six, eight or ten jurors were blacks.

MR. WEST: No further questions.

THE COURT: Mr. Kinne, any questions of Judge Entz?

CROSS EXAMINATION

BY MR. KINNE:

Q. Judge, let me ask you: You know, of course, myself, Mr. Macaluso and Mr. Nelson; is that correct?

A. Yes, sir. Other than you, the other two gentlemen nave been assigned as prosecutors by your office to my court at one time or another, as has Mr. West.

Q. During the time that Mr. Macaluso and Mr. Nelson served in your court, I presume that they had occasion to pick juries; is that correct?

A. Many, many times.

Q. All right. During the time that Mr. Macaluso and Mr. Nelson were there, the juries that they picked; do you recall there being minorities on those juries, blacks and Latin Americans?

A. Mr. Kinne, though with specificity I cannot pinpoint certain defendants, I am not aware of their **[105]** excluding racial minorities when they were prosecutors assigned to my court on a systematic basis.

Q. All right, fine. This prosecutor who made this request for a shuffle which you apparently overheard him say was because—

A. Hearsay.

Q. Hearsay, right. Because there were too many blacks apparently in the front of jury panel; is that correct?

A. Correct.

Q. I guess it is needless to ask since you said it was hearsay; it wasn't one of the prosecutors involved in this case?

A. No, it was not.

Q. Then, as far as you are concerned during your tenure with the D.A.'s office, and since—and during your tenure as a Judge here in Dallas County, as far as you are aware, there's never been a policy with the D.A.'s office to systematically exclude people from juries merely because of their race?

A. I am not aware of one.

Q. Thank you.

THE COURT: Mr. Cunningham or Mr.—

MR. WEST: Nothing further.

THE COURT: Judge, thank you. You **[106]** can be excused.

MR. CUNNINGHAM: I want to call Judge Kindeade [sic], if I could, out of order. He's got a jury trial he is trying to get back to. I thought we should accommodate him.

ED KINKEADE,

having been sworn as a witness to tell the truth, the whole truth and nothing but the truth, testified on his oath as follows:

DIRECT EXAMINATION

BY MR. CUNNINGHAM:

Q. State your name, please.

A. Ed Kinkeade.

Q. What is your business or profession?

A. I am a lawyer.

Q. And how long have you been practicing?

A. Since May of 1974.

Q. Do you hold any elected office as of this time?

[107] A. Yes.

Q. And what elected office do you hold?

A. I am Judge of the 194th District Court here in Dallas, Texas.

Q. How long have you been Judge of the 194th District Court of Dallas County, Texas?

A. Since September 1st, 1981.

Q. For the purposes of the record, is that a felony court or misdemeanor court?

A. A felony court of general jurisdiction, but we primarily hear felonies.

Q. Do you have any connection with the central juryroom? Are you the Presiding Judge for the central juryroom?

A. Not anymore, I was last year.

Q. When did your term expire?

A. We appointed somebody else two or three weeks ago.

Q. So, up until two or three weeks ago you were the Presiding Judge with—

A. Of the—Presiding Judge of the central juryroom, yes, sir. That's correct.

Q. Okay. To your court, I believe, you have felony prosecutors assigned; is that correct, sir?

A. Yes, sir.

[108] Q. Have you had an opportunity to read an article that was contained in the Dallas Morning News on Sunday, March 4, 1986, entitled Race Bias Pervades Jury Selection, Prosecutors Routinely Bar Blacks, Study Finds?

A. I read some of it.

Q. And I believe there was a follow-up article on Monday, March 10; did you read that one also?

A. I read that one.

Q. And I will ask you whether or not, as a result of your having read the articles contained in the Dallas Morning News pertaining to jury selection, you had cause to do anything in your particular court with respect to the selection of minorities to juries, on juries in your court?

A. To that question the answer is no.

Q. I will ask you whether or not you have proposed, or are in the process of thinking about proposing to the Judges,

that they, that the Judges, will tell the prosecutors that the exclusion of minority jurors solely for racial reason will not be tolerated? Will not be tolerated is my words, maybe there are other words that you used.

A. Should not be tolerated now.

Q. Should not be tolerated now?

A. Yes.

Q. Okay. I will ask you whether or not the **[109]** reason you are urging this to your other judicial colleagues, to take these steps to halt prosecutors from systematically barring minorities from trial juries, is a result of your having read the articles either Sunday or Monday in the Morning News dealing with race bias and jury selection?

A. Oh, probably partly but not primarily.

Q. You say partly it is because of what you read but not primarily? Are there other reasons why you propose to urge your judicial colleagues to take steps to halt prosecutors from systematically barring minorities from trial juries?

A. It is my personal feelings, what I think is fair and just in my job.

Q. Your personal feelings is why you propose urging this to your other colleagues, realizing that you cannot make them do anything, but you can ask them to do it?

A. Right.

Q. Tell us your personal feelings.

A. About what? I will be glad to.

Q. Okay. You propose to urge to your judicial colleagues to take steps to halt prosecutors from systematically barring minorities from trial juries. Do you propose doing that, sir?

[110] A. Well, I have done that already in my court, but I am going to propose that, or suggest to the other Judges that they consider doing something individually in their courts. I don't have any authority to tell any other Judge how to do anything, but I am going to talk to them about it, and then

everybody is going to make their own decision based upon what they think is right.

Q. Now, I understand that you said you have already done it in your court?

A. Right.

Q. Would you tell me what you did in your court to attempt to assure that minorities are not barred from sitting on trial juries?

A. That if you don't question a minority prospective juror you are going to have to put on the record why you are using a peremptory strike if all are used against minority veniremen.

Q. In other words, to see if I understand: If there are, say, six minorities in the first thirty-two, all thirty-two being qualified and there have been no challenges to the minorities in your court, the State is going to be required to state why the minorities are being struck?

A. If they're only striking minorities with their peremptory challenges, or some vast majority, if that's

* * * *

[114] excluding minorities, I hope does not include anyone of us three.

A. I don't think you have ever tried anything in front of me.

Q. Therefore, the answer is no; is that correct?

A. Well, that was my answer.

Q. And I take it what you are telling us is that you have had individuals in your courtroom, prosecutors, who you felt were excluding minorities based solely on the fact that they were minorities?

A. I can't read their mind, but I have seen them use their strikes solely on minorities to strike every minority.

Q. Well, let me ask you: It was your opinion, then, based upon what you observed of certain individuals, that these individuals were systematically excluding a particular group. Is that correct?

A. I don't know if they're systematically excluding a particular group, I just know they struck every minority on the panel. It might not have taken ten strikes, but they did strike every minority in the first thirty-two.

Q. Whether it was systematic or not, you don't know why they struck these minorities, but they did?

A. That's right.

[115] Q. Okay. And you are saying that you have prosecutors in there now, in your court, apparently who do not do that?

A. That's right.

Q. And you have had other prosecutors in your court who do not do that?

A. That's correct.

Q. Would that lead to the conclusion that there is no policy in the D.A.'s office of Dallas County to systematically exclude blacks?

A. Must not be because I get juries with minorities on them with some sets of prosecutors; that's correct.

MR. KINNE: That's all.

THE COURT: Redirect?

REDIRECT EXAMINATION

BY MR. CUNNINGHAM:

Q. I'm sorry, were your last words, "with some sets of prosecutors"?

A. Right.

MR. CUNNINGHAM: That's all, Your Honor.

THE COURT: Thank you, Judge, you can **[116]** stand down.

JOHN STAUFFER,

having been sworn as a witness to tell the truth, the whole truth and nothing but the truth, testified on his oath as follows:

DIRECT EXAMINATION

BY MR. CUNNINGHAM:

Q. State your name, again, please.

A. Stauffer.

Q. And I believe you have to get back to your office in order to meet a paying client?

A. Hopefully, the client will show up with the money, I hope. A lot of times, you know, they say they're coming and bringing the money, but either they don't appear or they come without the money.

Q. The reason I asked that is probably, if you are direct in answering my questions and Mr. Kinne's questions, you will be able to make it okay.

A. I will be as brief as I can.

Q. What is your business or profession?

A. I am in the private practice of law.

Q. How long have you been in the private practice **[117]** of law?

A. Almost seven years.

Q. Have you ever been employed by the Dallas County District Attorney's office?

A. Yes.

Q. When [sic] were you employed by the Dallas County District Attorney's office?

A. From September of 1964 until June of 1979, fifteen years approximately?

Q. Sir?

A. Approximately fifteen years.

Q. I will—and you were in the office at the time a manual was prepared by John Sparling dealing with the selection of jurors; is that correct, sir? Or do you remember that?

A. Well, it was a paper that he prepared for a manual.

Q. Okay.

A. The manual was a contribution type of thing. Many speakers who were teaching at the District and County Attorneys Association Annual School For Prosecutors, they would prepare a paper to go along with their oral presentation. It was a handout, but those were gradually collected and they made a manual.

Q. Was the manual updated from time to time **[118]** from—while you were in the District Attorney's office up until the time you left in '79?

A. The first three years that we had the manual it was updated every six months, because the school was every six months. Then the grants ran out, and when we go' the new grant it was just to be annually, so they only revised the manual once a year after that.

Q. This manual was for use by who?

A. Well, originally the District Attorney had established a chair in the D.A.'s office called the Director Of Training.

Q. Okay.

A. And the county didn't feel—the Commissioners didn't feel they could support that, that they had the funds to do it. So, the District Attorney applied to the Federal Government for a grant in order to have a training program, in-house program so to speak, for the prosecutor's staff. We got the grant in 1971 and it was for three years, and I was the one that—the grant only called for one hired employee, and I was the one that was the hired employee. In other words, the county really was reimbursed for my salary during that period of time from the grant. And the grant also had money in it for the printing of the handout material that went with the school.

Q. And I believe you said that that continued—**[119]** initially, it was reviewed every six months, then after the grant, the second grant, it was renewed once a year?

A. That's correct.

Q. And was the second period for three years, an additional three years?

A. Yes. There was—there was a gap of five months between the ending of the grant of three years and our getting it reestablished. We had a five month hiatus in there.

Q. This manual was for the use and benefit of the persons employed by the Dallas County District Attorney's office. Is that correct, sir?

A. Yes. But the grant, the application for the grant. When we presented it we were asked by people in Austin who administered the federal money that was given to this state, they asked us if there were any prosecutors outside of Dallas County that might want to come and attend, if we would object to that. And we thought they were talking about Waxahachie, or McKinney, Collin County, Midland—I don't mean Midland, maybe Greenville. So, we said yes, not realizing that when we started it people, would be interested from all over the state. And pretty soon we had people coming to attend the course from a hundred and sixty-five counties. Came from as far away as El Paso.

[120] Q. These was either District Attorneys or County Attorneys?

A. Or their assistants.

Q. Or their assistants?

A. Yeah.

Q. Were you the person that was in charge of this program the entire six years that it was in force and effect?

A. Yes. When we no longer had our second grant, when that three years ran out, it was then taken over by the Texas District and County Attorneys Association. They already had a grant and they added money to their grant for them to take it over. By this time, people looked forward to coming to it from all over the state. We would have representation there from maybe two-hundred twenty counties, even investigators came sometimes.

Q. Okay. While you were in the District Attorney's office did you have occasions to try any capital murder cases?

A. Yes.

Q. Can you tell us, roughly, how many you tried?

A. Oh, I can't give you a figure on it, but three or four at least.

Q. Okay. During—well, were there any black jurors on any of the three or four capital murder cases **[121]** that you tried while you were in the District Attorney's office?

A. Yes.

Q. Can you tell us—well, did you have a black on each of the three or four?

A. No. I remember one particular case very well, it was about fifteen years ago, it was either 1970 or '71, wherein we had a black defendant. I think most of the other death penalty cases that I participated in we had white defendants, it just so happened, the ones I was on. But there was a case, it was one of the Blitz Bandit cases. The media referred to it as the Blitz Bandit because they would blitz in and blitz out of a business establishment and perform an armed robbery. And in one of those blitzing in and blitzing outs they shot and killed the white woman proprietor of this little store. And she had a black employee in there who was a butcher in her little store, and they made him lie on the floor but he got to see everything. So, we were trying that case for the electric chair. This was back when the law provided for the electric chair, under the old law. And the victim was a white woman, the defendant was a young black male. On the jury in that case there was one black member, and he was elected foreman, and we did get the electric chair in that case. That was in Judge Scales' court, the 195th.

[122] Q. Can you tell us, roughly, when that was?

A. Well, it was either 1970 or 1971. I left when I—when the grant came through in '71, then they took me out of the court as a regular prosecutor assigned to one court and I became, well, the Director of Training, but occasionally I would still try a case now and then.

Q. How long did the jurors stay out on guilt or innocence?

A. They stayed out, altogether, eleven hours.

Q. Was the black juror the cause of the jury staying out as long as they were?

A. No, I learned later in talking with him well, this may be several months after the trial was over—I visited with him one day and he explained to me what the hold up was on it, why it took them eleven hours to reach a guilty.

Q. It was not him?

A. No.

Q. How long did it take them to reach a verdict on the electric chair?

A. One hour.

Q. On the other two or three—well strike that. Up until that time you would have been in the District Attorney's office how long?

A. About seven years.

[123] Q. Okay. Would that have been the first black, that you know of, that had served on a capital murder jury?

A. It was my understanding that that—when this black man was taken as a juror in the case I just mentioned about the Blitz Bandit case, that I had the distinction at that time of being the first prosecutor in the state trying death penalty case—not just here but anywhere in the state—wherein the accused citizen was a black person and the victim was a white person, wherein a black person ended up on the jury. I sort of wear that proudly.

MR. CUNNINGHAM: Pass the juror. Pass the witness.

THE COURT: Cross? Oh, I am sorry.

Q. (By Mr. Cunningham) Mr. Stauffer, I show you what's been admitted as Defendant's Exhibit No. 1, and ask you whether or not you have had occasion to see that document before?

A. Yes, I think I have.

Q. Would that have been the document written by John Sparling pertaining to the selection of jurors?

A. Yes, it is.

Q. And was that document included in the manual that—well, in '71 you became Director of Training; was that document included in all of the—

[124] A. As I recall.

Q. —training manuals?

A. As I recall, Mr. Cunningham, I got him to write this. In other words, when we were trying to prepare the manual to square up to the obligations we had made on the grant. In other words, when we applied for the grant one of the things we said we would do would be to prepare a training manual. And I asked all of the people who were assigned to speak on different subjects at the school to prepare a paper that went with their talk. And so, that is how this came to be written in the first place.

Q. Would it have expressed the policy of the office with respect to how jurors were selected?

A. Well, I don't necessarily think it would express the policy of the office, the office didn't really have any set policy. It was Mr. Sparling's, John Sparling's, idea of—in picking a jury, just generalities.

Q. Well, he wrote it and it became of such—it must have been of such good quality because you included it in your manual, didn't you?

A. I included all—everybody that was good enough to take the time to speak at our school, because there was no money for them. Those who took the time to prepare a presentation and to prepare a paper to go with **[125]** it, I was very grateful to them.

Q. And you put it in the manual?

A. We did.

Q. And you reviewed the manual, and if there were, changes you took out what was not of any force then?

A. At one time I remember he talked to me about it. He said, "I am not sure that I want my paper to be published anymore," after it had been in there maybe through two or

three editions, back when we were doing it every six months. He said he would like to take it out because he thought maybe some people didn't understand, maybe they would be offended. And I encouraged him, I said, "John, there's not anything to be ashamed of in that paper, all you are doing is saying, 'if you are trying a Mohammedan or Muslim don't put people on the jury wearing turbans,' any lawyer would understand in reading that what you are saying." "Well, he said, "I know, but some people might misunderstand." And I was the one that encouraged him to do it. About that time, Time Magazine came out with a big article about him, rather derogatory, and I remember I kidded him. I said, "See, you did what I told you and now you are world famous," and he didn't think that was very funny.

MR. CUNNINGHAM: Pass the witness.

THE COURT: Do you care to talk to **[126]** him, Mr. Kinne?

CROSS EXAMINATION

BY MR. KINNE:

Q. Mr. Stauffer, you have already explained to us, I believe, that these papers that were presented at the District Attorneys' School did not represent policy of the office; is that correct? This paper or any of the rest of them?

A. Well, No. In other words, there's never been any effort ever made to take this manual that we had gotten together, that we had edited and put together to go with our school, there had never been any endorsement by the District Attorney. I don't think Mr. Wade ever looked at it to any extent, he certainly didn't review it before it went to press. It was done by Thomas Reprographics, whatever it is, sort of a high class xerox deal, that's how it was printed. It just had a paper cover on it until, oh, I think it was in the fourth year that we were able to have binders, regular three-ring binders.

Q. Whether or not this was the—are you saying this was the first, in 1970 or '71, the first black person to serve on a death penalty jury, or the first black person to serve on a

death penalty jury where the victim was a **[127]** white person?

A. And the- defendant was a black person.

Q. The victim was a white person and the defendant was a black person, all those things combined?

A. In other words, I don't think there had been any death penalty case tried in the State of Texas prior to this Blitz Bandit case—I'm sorry I don't remember the name of the defendant—wherein the victim was a white person and the accused citizen was a black person, trying it for the death penalty, where a black was on the jury. That's my understanding.

Q. You are not saying that case in 1970 or '71 was the first time that a black person served on a death penalty jury in the State of Texas or Dallas County?

A. No, I'm not saying that.

Q. All those things combined, okay. I take it then since you have—did you select the jury in that case?

A. Yes I did. I had two people helping me; Winfield Scott was second chair, third chair was Don Driscoll.

Q. I take it then, since you selected a black man to sit on that particular jury and you were an Assistant district Attorney working for Henry Wade, that it was not the policy of the District attorney's office to exclude **[128]** black people from death penalty juries simply because of their race?

A. That's right.

Q. As a matter of fact—

A. Nobody ever said anything to me about it upstairs, and I didn't—you know, when the jury was selected and all. I think the black man was the second juror that we selected and we still had ten to go, but I never, ever during the balance of jury selection, or throughout the trial, or any time ever, had anybody say anything to me from Mr. Wade on down through the hierarchy about my doing that.

Q. Then, is it your understanding that as long as you were with the District Attorney's office it was never the policy of the District Attorney's office to systematically exclude anybody, black, Mexican, Oriental from a jury simply because of their race?

A. That's right. We did take into consideration any possible sympathy that a potential juror might have for the accused citizen. In other words, if we were trying a black person we, particularly if the victim was a white person—I am not talking about a death penalty trial but any trial—we worried that perhaps the black jurors might find the accused citizen guilty but might be lenient on penalty. This would worry us sometimes, just as if you **[129]** were trying a woman you might not put other women on the jury, or something like that.

Q. As a matter of fact, a careful reading of the article written by Mr. Sparling on the front page says, and I quote, "The outline does—referring to this paper—however, contain one prosecutor's ideas on some things that need to be said to the panel and some things to look for in a juror" Is that correct?

A. That's correct. In other words, we encourage these people, or asked these people to take part in this school. We had about thirty-five different subjects that we wanted covered; everything from examining hearings, examining trials to putting on a different type of case, putting on a robbery case, putting on a burglary case, theft case, and so on. We invited people not just from the Dallas County District Attorney's office, but we had a number of people from Harris County who participated, who came up here and took certain topics and prepared their paper to go with it at my request. I know we got ready to go to press a few times and there would always be somebody who didn't have his paper in. We would have to burn a fire under him to get it done, but none of those people were in any way forced or put in a box as to what they could teach, say or write. We were glad and grateful for their time because we couldn't pay them any-

thing for it. We didn't [130] have a way to reimburse people from Harris County for their travel up here.

MR. KINNE: Thank you, John. That's all we have.

THE COURT: Redirect?

REDIRECT EXAMINATION

BY MR. CUNNINGHAM:

Q. Mr. Stauffer, initially when John Sparling wrote that handout, or article, or whatever you want to call that, it may have been one prosecutor's opinion with respect to jury selection; is that correct?

A. That's correct.

Q. However—well, let me ask: Did any other person furnish any information with respect to jury selection in '70 or '71?

A. No, not that I know of, he was the one. You know, when we were making these assignments and trying to get somebody to take this subject or take that subject, we were able to entice him into sticking his neck out to do this and prepare the paper that went with it.

Q. After you had gotten your grant and were able to combine all of the material into a manual, that [131] Defendant's Exhibit No. 1 is the material that went in there to tell prosecutors in Dallas County a method of selecting jurors? Is that correct, sir?

A. Well, it was a paper that—to try to give them some ideas, things to think about in jury selection, you know. Jury selection is still very much an inexact science, everybody has their own ideas about it.

Q. You thought enough of it as the director to include it in the manual, so that future prosecutors would be able to look at that manual when they wanted to get some ideas about how to select a jury that was prosecution prone, they would have that material?

A. How to use their strikes, really. Really, you don't, select who-you want, you just select who we don't want.

Q. That particular article continued in the manual up until '79 when your money ran out? Or '76 is when your money ran out; is that correct?

A. Right, but then the State took over. Whether his paper was still in after the State took it over or not, I don't remember. It seems to me it was. May I just say one thing on that? The reason that Sparling's paper remained in there throughout and was never changed from him to somebody else is because he stayed with the District Attorney's office through those years. We have an awful [132] lot of turnover in the Dallas County District Attorney's office, as you know, Mr. Cunningham. A lot of times I would have somebody lined up to talk with us, say, on how to try an armed robbery case and he would prepare his paper; and the next time we were to give the school and reprint our manual again that person would no longer be in the D.A.'s office. I would have to try to entice somebody else to take that responsibility over and revise the paper, if it needed revision.

Q. But the paper that's in your hand there was never revised from '70 or '71 through '76 when your money ran out?

A. Well, it may have been revised, but if it was, it was revised by John Sparling.

Q. Then continued in the manual?

A. Yes. Each author had the opportunity to add to, or to subtract from, or change their paper if they wanted to. Now, an awful lot of people were lethargic about doing it and their paper would get out of date with new law.

Q. And I believe you said it is your impression that that particular article dealing with the selection of jurors carried over in 1977 when your money ran out and it was taken over by the state?

A. Right. And when they started doing the [133] manuals they were beautiful, because they had great big binders and all kind of money. And it came out, I think, in a four-binder set, and it made me a little jealous because mine never were that pretentious.

MR. CUNNINGHAM: You are on your own time now.

THE COURT: May he be excused?

MR. CUNNINGHAM: Yes, sir.

MR. KINNE: Yes, sir.

MR. CUNNINGHAM: Your Honor, at this time we would renew our request for Steve McGonigle and Ed Timms.

THE COURT: I am going to sustain the motion of the Dallas Morning News to quash those subpoenaes. I will give you the opportunity, if you want, to make an offer of proof in that regard though, as soon as—

MR. WEST: Your Honor—

THE COURT: I am not trying to cut off argument. I think you, Mr. McElhaney and Mr. West, made arguments earlier today. If you have anything else you want to say, I didn't intend to be abrupt with you on it. Assuming you do not, if you want to **[134]** make an offer of proof, I will certainly, for the purposes of making the record, let you.

(Thereupon, Defendant's Exhibits No. 4, 5 and 6 were marked for the purposes of identification.)

MR. CUNNINGHAM: Your Honor, for the purposes of this offer of proof: If Steve M-c-g-o-n-i-g-1-e and Ed Timms were called they would testify that they are staff writers for the Dallas Morning News, a newspapers published in Dallas, Dallas County, Texas. That on or about Sunday, March 9, 1986 they wrote an article jointly, the first in a series, entitled, Race Bias Pervades Jury Selection Prosecutors Routinely Bar Blacks Study Finds. That is an article that appears on page 28, and 29, and page 30. We would offer all of the materials contained in that article pertaining to the race bias which pervades in jury selection, marked Defendant's Exhibit No. 4. We offer as—we would also offer, first offer, the March 9, 1936, it is **[135]** marked Defendant's Exhibit No. 4. The second offer is Defendant's Exhibit No. 5, and it would be an article entitled, Jury Selection Bias Throughout Texas, a second in a series by Ed

Timms and Steve McGonigle, M-c-g-o-n-i-g-1-e, beginning on page 1 and continuing over to page 10A.

The third article written by the same two staff writers, and the last in a series, was written on Tuesday, March 11, 1986, entitled, Some States Act To Reduce Jury Selection Bias, Prosecutors Arbitrary Exclusion Of Minorities Challenged, beginning on page 1 and continuing over to page 7A. And, also, we would offer on page 6A the, Judges Plan To Judge Action To End Jury Selection Bias, written by the two same staff writers, and referring to what Judge Ed Kinkeade proposes to offer to his fellow colleagues on the Bench.

Also, If the two staff writers were called we would have requested that they furnish us with the names of one hundred jury trials that eligible, black potential voters were called in on in the amount of four **[136]** hundred sixty-seven. That the number of blacks struck by prosecutors using peremptory challenges was four hundred five, and that of this number seventeen were double strikes. That the number of blacks struck by defense attorneys was sixteen, and that the total number of blacks selected for juries out of four thousand four-hundred thirty-four prospective jurors summoned was forty-six.

We would also offer as a part of this offer of proof—and I will have to get that—the cases of the State of Texas versus David Wayne McKay, a capital murder case out of Criminal District Court No. 1; the State of Texas versus Harold Joe Lane, a capital murder out of the 291st; the State of Texas versus Tommy Mann, a capital murder case out of Criminal District Court No. 1; the State of murder Texas versus John Fearance, a capital 20 case out of Criminal District Court No. 4; Jonathon Reed, a capital murder out of Criminal District Court No. 5; Danny Lee Barber, a capital murder case out of Criminal District Court No. 1; Howie Ray Robinson, out of the 204th District Court; the State of **[137]** Texas versus Montoya, 282nd Judicial District Court; the State of Texas versus Ronald C. Chambers, out of Criminal District Court No. 4; and the State of Texas versus

James Edwin Nolan. I will have the jurors who were selected, and material pertaining to those jurors as to their race, to determine whether or not there were any blacks that were seated, that were members of—jurors that actually sat in those eleven cases.

THE COURT: In other words, you propose to supplement your offer later on with that information?

MR. CUNNINGHAM: Yes, sir.

THE COURT: I don't mind, providing the State has a chance to meet it if they want to. Okay, is that the extent of your offer of proof?

MR. CUNNINGHAM: And, Your Honor, our investigator can—we'll attempt to find out the one hundred felony cases that were used in the articles to determine—to arrive at the graph that is shown on the front page of Defendant's Exhibit No. 4, those one hundred felony trials. I would ask the Court to hold **[138]** it open because we may want to supplement it with additional information concerning other capital murder trials that have been tried in Dallas County, specifically, with the persons who were actually jurors in those cases and the race of the jurors in those cases.

THE COURT: I haven't got any problem with that unless the State does.

MR. CUNNINGHAM: I'm sorry?

THE COURT: You propose to supplement your offer with specific information about the race of these jurors in these cases if your investigation leads you to that. Is that what you are saying?

MR. CUNNINGHAM: Yes, sir.

THE COURT: I don't have any problem with that, Mr. Cunningham. Mr. Kinne, again, I will give the State a chance, if they don't agree with your offer, we'll have a hearing on that I suppose. Anything else in your offer of proof?

MR. CUNNINGHAM: That's all at this time, Your Honor.

THE COURT: Mr. Kinne, any objection from the State other than those already made, **[139]** and that is to relevancy and such as that?

MR. KINNE: Other than those? No, sir. For the purposes of this hearing, certainly, we are not about to agree that the newspapers article is probative evidence of anything.

THE COURT: Okay. Well, I accept that.

MR. CUNNINGHAM: Your Honor, that's even more reason why we ask the two staff writers be brought in, so we could have an opportunity to examine them and determine the probative nature and the validity of their article.

THE COURT: If they were allowed to testify, wouldn't the testimony be hearsay and their opinion as opposed to factual?

MR. CUNNINGHAM: Not based upon the records, Dallas County records.

THE COURT: Which records are the best evidence of what you are trying to prove?

MR. CUNNINGHAM: They're the ones that know one hundred felony cases. If I had the list I would be able to do the rest.

THE COURT: Okay. Mr. Kinne, I noted your comment.

And the Court will, of course, **[140]** permit that offer of proof to be made part of the record, assuming I don't grant the defendant's motion. Argument on the motions? We actually have two motions, I suppose; one to quash the jury, a second, alternatively, to select a separate one to hear punishment.

Argument? More argument I should say?

MR. CUNNINGHAM: I waive opening.

ARGUMENT ON THE MOTION

MR. KINNE: Your Honor, I believe that probably the record during jury selection amply supports this. However, for the purposes of this hearing, I would like the record to reflect that the jury in this case that was selected consists of

seven white females and five males, and of that group there is one black male, there is one male of Hispanic descent, and there is one male of Filipino, hence Oriental descent. I would also like the record to reflect that during the course of voir dire examination that both the State and the Defense entered into certain agreements to excuse particular jurors. That **[141]** these agreements were for the most part, if not all, entered into in writing between counsel for the Defense and counsel for the State, wherein both sides agreed to exclude or to excuse from jury service in this case six black individuals, two individuals of Hispanic origin and one oriental. We feel that the Defense has fallen far short of showing there is any systematic exclusion of any person, or persons, from this jury due to "the" their membership in any minority. We would urge the Court to deny the motion.

THE COURT: Thank you, Mr. Kinne.

MR. CUNNINGHAM: Your Honor, before we do it, I have another offer I totally forgot. Your Honor, I am offering as Defendant's Exhibit No. 7 the questionnaire prepared by juror No. 7, Roderick R. Bozeman, a black male struck by the State as their number one strike; the questionnaire for juror No. 9, Billy Jean Fields, a black male struck by the State as their number two strike; the questionnaire for Joe Alfred Warren, juror No. 28, a black male; Edwin L. Rand, juror No. 37, a black male struck by the State; the **[142]** questionnaire for juror No. 40, Carol S. Boggess, struck by the State; Wayman Kennedy—Wayman A. Kennedy, juror No. 43, struck by the State; juror No. 71, Linda C. Baker, struck by the State, a black female; Janice Mackey, a black female, juror No. 100, struck by the State; juror No. 102, Paul Bailey, a black male struck by the State; and Anna L. Keaton, juror No. 105, a black female struck by the State. We offer in evidence those seven questionnaires of ten of the State's fourteen strikes in this case.

THE COURT: Juror Keaton was not a black person.

MR. CUNNINGHAM: Uh-huh.

THE COURT: Okay.

MR. CUNNINGHAM: Yes, sir.

THE COURT: That's fine, I just had it noted different on my sheet. Okay, those will be made a part of the record.

MR. CUNNINGHAM: Your Honor, also for the purpose of it record, Mr. Kinne indicated that we had excused six or seven others by agreement. Juror No. 17 was Hilbert Gitchoway, a black male juror; No. 30, Dora **[143]** May Randle, a black female; Jerry—juror No. 61, Jerry W. Mosley, was a black male. And that those were the only three blacks that were agreed to be excused by the parties.

MR. NELSON: Judge, we are going to the State will object to that as being incorrect. I think the record, and the Court's records, reflect that Vergie Miller, juror No. 50, was excused by agreement. No. 51, Evangelina Sustaita—I am not sure how you pronounce that—was excused by agreement. No. 56 was excused by agreement. I believe Mr. Cunningham named Mosley. Lourice Collier was excused by agreement, juror No. 67; Johnny Terry, juror No. 80; and Helen Reyes, juror No. 84, were also excused by agreement of both parties.

THE COURT: Well, of course, the record in voir dire, which is the official record, will reflect what was done. The court has the written agreements in the file on many of the jurors who were excused by agreement. And I assume, and the record again will have to be the final arbiter on this, will reflect there were a few jurors who were excused after being **[144]** voir dired for a while for one reason or another. I don't know if we secured written agreements. Because there were situations where the juror had physical problems, or something of that sort, and were excused as a result of the parties agreeing ahead of time. So, I will let the record reflect who was excused for what purpose.

MR. KINNE: Your Honor, we further object to the, I guess it is Defendant's Exhibit No. 7, all of the questionnaires, in that these questionnaires appear to contain handwriting which is not the handwriting of the juror but apparently some handwriting put on there by the Defense. We have no objection to the questionnaire as filled out by the

juror, but we'll object to whoever wrote the rest of this material that's written on these questionnaires.

MR. NELSON: Am I not correct; the Court put the original questionnaires in the Court's record as to each of these jurors?

THE COURT: I understand from the court reporter that she was accumulating them out of her set of copies.

[145] MR. NELSON: we would simply ask, since those have not been written on or have any type of marks, other than by the jurors, those be included in the record rather than Mr. Cunningham's copies.

MR. CUNNINGHAM: I have no problems with that as long as the court reporter knows which ones, and the numbers, and that they in turn will be marked Defendant's Exhibit 7.

THE COURT: I think even the Court marked his own copies for one reason or another, for personal observation. That might not be appropriate. Anything else, Mr. Cunningham?

MR. CUNNINGHAM: That's all, Your Honor.

THE COURT: Do you have any argument then in response to the State's argument?

MR. CUNNINGHAM: I think the record is clear that systematic exclusion of blacks is evident.

THE COURT: I appreciate the brevity of that argument.

MR. CUNNINGHAM: John took up all my **[146]** time.

THE COURT: Mr. Cunningham, Mr. West, the State, the Court is going to deny both of these motions, not necessarily make specific findings of fact. The evidence I heard today makes me conclude, based on the testimony of these various witnesses, that the exercise of peremptory challenges in the District Attorney's office in Dallas County over a period of time has been for a variety of reasons; personal, subjective, and sometimes even emotional reasons. And that I had no evidence presented to me that indicated any sys-

tematic exclusion of blacks as a matter of policy by the District Attorney's office; while it may have been done by individual prosecutors in individual cases. And I believe from the evidence I have heard, coupled with the current status of the law as I understand it, the Supreme Court cases including the Swaim, S-w-a-i-m, case and case out of Missouri that slips my mind momentarily—Grigsby versus Marberry, plus the other cases, convince me that I am following the law in **[147]** this regard. So, I have denied both motions.

MR. CUNNINGHAM: Your Honor, would we have the right, in case the Supreme Court decides, well, renders an opinion in Grigsby versus Marberry before we complete this trial, to possibly supplement it with what the Supreme Court says in that case; since it has already been argued and they are presently getting ready to decide?

THE COURT: Has it been argued?

MR. CUNNINGHAM: They have argued it.

THE COURT: I will say this: Any time the Supreme Court decides to change the law I am going to at least read it.

MR. CUNNINGHAM: I will tell them to ship me a copy if it is within the next ten days. Note our exception to the Court's ruling with respect to the motion with respect to the systematic denial of minorities on juries, and also the—did I understand the Court-to deny us a separate jury on punishment?

THE COURT: Right.

MR. CUNNINGHAM: Under Grigsby versus Marberry.

[148] THE COURT: At this point, unless the Supreme Court of The United States decides different, our statutes don't provide for it.

MR. CUNNINGHAM: If the Supreme Court affirms Grigsby versus Marberry what would the Court propose doing then?

THE COURT: I suppose give the defendant a new trial, if he's been convicted, because—

MR. CUNNINGHAM: Note our exception to both rulings, Your Honor.

THE COURT: Perhaps the State would answer that. Are we ready to go forward on the other motions?

MR. CUNNINGHAM: I will be in just a moment.

THE COURT: Mr. Cunningham, you had a couple of other motions to have me at least think about. Do you want to urge—

MR. CUNNINGHAM: Your Honor, we have a Motion To Sequester The Jury. We would ask that the jury be sequestered from the date that the Court brings them in to first start hearing testimony.

THE COURT: I am going to deny that at

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COURT OF CRIMINAL APPEALS OF TEXAS,
EN BANC.

No. 69677

THOMAS JOE MILLER-EL,

Appellant,

v.

THE STATE OF TEXAS,

Appellee.

March 3, 1988
Rehearing Denied April 27, 1988
[748 S.W.2d 459]

OPINION

W.C. DAVIS, Judge.

Thomas Joe Miller-El, hereinafter referred to as appellant, was convicted by a jury of intentionally causing the death of Douglas Walker while in the course of committing the underlying offense of robbery, which elevated the offense of murder to capital murder. *See V.T.C.A., Penal Code, § 19.03(a)(2).* After the jury answered the two special issues in the affirmative, the trial judge assessed appellant's punishment at death. *V.A.C.C.P., Art. 37.071.*

In his brief appellant asserts thirty-six points of error. In his first seven points of error, appellant contends that the prosecutor's use of ten of fourteen peremptory challenges to exclude black veniremen from sitting as jurors in this case violated his right under the Sixth Amendment to a jury drawn from a cross-section of the community. We shall abate the appeal and remand to the trial court for a hearing under the auspices of *Batson . Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

The record reflects that during voir dire, the prosecutors exercised fourteen of the allowed fifteen peremptory challenges. Ten of the fourteen challenges were used to exclude black veniremen from sitting as jurors. Only eleven members of the black race were on the venire panel. In the end, one black juror was seated. Appellant is a member of the same race as the ten excluded veniremen. Appellant contends that the conduct of the prosecutors, in excluding the ten black veniremen, violated his constitutional rights guaranteed by the Sixth Amendment and the Equal Protection Clause of the Fourteenth Amendment to a jury drawn from a cross section of the community. Appellant asserts that the prosecutor's use of the peremptory challenges to exclude the ten black veniremen clearly established a purposeful or deliberate denial to blacks to participate as jurors in his case.

[460] Prior to the individual voir dire of the veniremen, appellant filed a Motion To Quash The Indictment because of the exclusion of blacks from the jury panel. After the hearing, the trial court refused to quash the indictment. In this cause, it can be argued that appellant had a *Batson*, *supra*, hearing on his motion to quash the jury that heard his case. However, given the fact that *Batson*, *supra*, was not decided until after the case at bar had been tried to completion in the trial court, and given the testimony that transpired at the hearing, we believe such an argument would border on being specious.

We find that on the facts of this case, appellant sufficiently raised the issue of the State's use of its peremptory strikes at trial to invoke *Batson*, *supra*, protections on appeal. Cf. *DeBlanc v. State*, 732 S.W.2d 640 (Tex. Cr. App.1987).

In *Batson*, *supra*, the Supreme Court reiterated its observation that the State's purposeful or deliberate denial of jury participation to black persons because of race violated a defendant's rights under the Equal Protection Clause of the United States Constitution. It then found that the State

could not challenge potential jurors solely on account of their race.

In order to invoke the protections set forth in *Batson*, *supra*, a defendant must establish purposeful discrimination by showing that:

1. he was a member of a cognizable racial group;
2. the prosecutor had exercised peremptory challenges to remove from the venire members of the defendant's race (peremptory challenges constitute a jury selection practice which permits those to discriminate who are of a mind to discriminate); and
3. the facts and any other relevant circumstances raise an inference that the prosecutor used peremptory challenges to exclude the veniremen on account of their race.

106 S.Ct. at 1723

If the defendant raises an inference of purposeful discrimination through the State's use of its peremptory strikes, the burden shifts to the prosecutor who must come forward with a neutral explanation for the challenges. The trial court must then determine whether despite the State's explanation, the defendant has established purposeful discrimination. The Supreme Court in *Batson*, *supra*, stressed that not just any explanation would do, and in fact some explanations would per se not be sufficient. *Batson*, *supra*, 106 S.Ct.1722,1723. By largely judging credibility of the prosecutor, as well as content of the explanation, the trial judge must make a finding of fact concerning purposeful discrimination which should be given great deference by a reviewing court. *Batson*, *supra*, n. 21.

In the instant case, appellant clearly objected to the prosecutor's use of peremptory strikes. After the hearing to quash the indictment, the trial court overruled the appellant's motion on the jury selection issues by noting that the appellant failed to demonstrate systematic exclusion of black veniremen by the Dallas County District Attorney's Office.

We find that appellant has established an inference as required by the *Batson* court. First, he is a member of the black race. Second, the prosecutor exercised ten of fourteen peremptory challenges to exclude members of appellant's race. Finally, in using such a skewed number of strikes on the black veniremen, ten of the eleven prospective black jurors were peremptorily struck, with only a single black juror seated on the panel. However, it is not for this Court to say whether there was racial motivation in the prosecutor's actions. *Batson*, *supra*, requires that such a determination be made by the trial judge.

Because the trial court did not have the benefit of the Supreme Court's opinion in *Batson*, we feel it is now appropriate to remand the case so that the trial court may have the opportunity to consider first whether appellant had made a *prima facie* showing of discrimination, and then if so, whether the State had a neutral explanation for the strikes. If the State is unable to explain properly its use of peremptory strikes on minority members **[461]** of the prospective jury panel such that the trial court concludes that purposeful discrimination was the sole motivating factor behind any of the State's strikes, then the trial court should enter this finding in his findings of fact and conclusions of law. Such findings of fact and conclusions of law shall be forwarded to this Court for review.

DeBlanc, *supra* at 642.

This appeal is hereby abated with instructions to the trial court to conduct further proceedings not inconsistent with this opinion and *Batson*. The trial court shall forward the record of those proceedings and findings of fact and conclusions of law to this Court. *DeBlanc*, *supra* at 642. *Henry v. State*, 729 S.W.2d 732 (Tex. Cr. App.1987); *Keeton . State*, 724 S.W.2d 58 (Tex. Cr. App. 1986).

It is so ordered.

ORDER ON REHEARING

MILLER, Judge.

The State's Motion for Leave to File a Motion For Rehearing is denied.

This appeal is abated to the trial court with instructions that it conduct a hearing pursuant to the full procedure and steps outlined in *Keeton . State*, 749 S.W.2d 861 (Tex. Cr. App. 1988) (opinion following abatement).

IT IS SO ORDERED.

IN CRIMINAL DISTRICT COURT VERSUS NO. 5
DALLAS COUNTY, TEXAS
APRIL TERM, A.D., 1988

[Filed June 29, 1989]

NO. F85—7 866 8—NL

THE STATE OF TEXAS
VERSUS
THOMAS JOE MILLER—EL

* * * * * * * * * * * * * *

HEARING
VOLUME I OF I VOLUME

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APPEARANCES

HON. JOHN VANCE
Criminal District Attorney
Dallas County, Texas
BY: HON. JEFF KECK and
MS. SHARON BATJER
Assistant District Attorneys

APPEARING FOR THE STATE

HON, ROYCE WEST
and
HON. BRUCE CUNNINGHAM
Attorneys at Law
Dallas, Texas

APPEARING FOR THE DEFENDANT

BE IT REMEMBERED, to-wit: That on the 10th day of May, A.D., 1988, the above styled and numbered cause came on to be heard before The Honorable Pat McDowell, Judge of Criminal District Court No. 5 of Dallas County, Texas, and the following is a true, correct and complete transcript of all the proceedings had:

[3] PROCEEDINGS

THE COURT: Let me call, for the record, F85-78668-NL, The State of Texas versus Thomas Joe Miller-El. Let the record reflect these events: This case is a case in which the jury, having answered affirmatively to special issues after the Defendant was found guilty of the offense of capital murder—his case has been appealed to the Court of Criminal Appeals, State of Texas. I understand that briefs have been submitted and oral argument has been made. The Court of Criminal Appeals ordered this trial court to conduct a hearing which I will characterize as a Batson hearing. That is the purpose and thrust of this hearing this morning.

Are both sides ready on that?

MR. KECK: The State is ready, Your Honor.

MR. CUNNINGHAM: The defense is ready, Your Honor. Your Honor, at this time we would invoke the rule and ask that the witnesses who expect to testify be excluded.

THE COURT: Who will the State's witnesses be, Mr. Keck?

MR. KECK : We have secured the presence of both Mr. Macaluso and Mr. Nelson, Your Honor. I believe we will call Mr.. Macaluso to testify briefly and we may then call Mr. Nelson.

[4] THE COURT: In an abundance of caution, I will honor that. I'm not sure it applies in this case. These are both officers of the court, but neither one of them now is a Dallas County prosecutor so technically they're not any better than any other witness. They're just witnesses.

Mr. Cunningham, you're standing preparatory to doing something. I'm going to interpret this as a fullblown Batson hearing. By that I mean, I think I am going to insist that the defense make a showing, at least a prima facie showing, that discrimination was invoked in the State's striking of certain jurors just so, if nothing else, we will have an entire whole record. We thought, frankly, for the record, that we were doing it properly during the voir dire of the capital murder

case. I felt that this Court's determination of certain objections made by the defense during that time resolved the issue of my finding on discrimination, but in view of the later cases and the Court of Criminal Appeal's particular order, I'm going to place the burden back on you-all to at least make a prima facie showing that Batson has been violated.

MR. CUNNINCHPM: Your Honor, on behalf of the defense at this time we would ask the Court to take judicial notice that Thomas Joe Miller-El is a member of the negro black Afro-American race.

THE COURT: I don't think there is any dispute **[5]** about that, is there, Mr. Keck?

MR. KECK: No, Your Honor. We will stipulate to that.

THE COURT: The Court will do that.

MR. CUNNINGHAM: Secondly, in support of our prima facie case, we would advise the Court or would show to the Court that Roderick R. Bozeman, prospective juror number seven, was a black male and was struck on February 5th of 1986, and was the first strike of the State.

Secondly, that Billy Jean Fields, a black male, was the State's preemptory strike number one and Bozeman was preemptory strike number—Bozeman was preemptory strike number one and Billy Jean Fields was preemptory strike number two by the State. He was juror number nine. Joe A. Warren, a black male, was struck by the State preemptorily and he was strike number six. He was number twenty-eight on the prospective juror list; that Edwin L. Rand was a black male, that he was struck by the State, that he was the State's preemptory strike number seven and he is thirty-seven on the prospective jury panel list; that Carol S. Bogges, a black female, was struck by the State of Texas and that was the State's preemptory strike number eight and she is number forty on the jury list; that Wayne A. Kennedy, a black male, was struck by the State. He was the State's preemptory strike number nine and he is number **[6]** forty-three on the jury list.

Linda C. Baker, a black female, was struck by the State and she was the State's preemptory strike number ten and she was number seventy-one on the jury list. Mrs. Janice Mackey, a black female, was struck by the State and she was preemptory strike number twelve and she is juror number one hundred on the jury list.

Mr. Paul Bailey, a black male, was struck by the State and he was preemptory strike number thirteen. He is number one hundred and two on the jury list.

Finally, Mrs. Anna L. Keaton, a black female, was struck by the State and she was preemptory strike number fourteen. She is number one hundred and five on the list.

The State of Texas, between February 5th of 1986 and March 6th of 1986, exercised fourteen of its preemptory strikes; that ten of those fourteen preemptory strikes used by the State were used to strike either a black male or a black female.

Further, in support of Defendant's prima facie case, we at this time would offer all the evidence beginning on March 12th, 1986 that was offered with respect to its motion to quash and/or suppress the jury panel and/or to strike the jury panel including the testimony of the witnesses John Sparling; Jack Hampton, judge of the **[7]** 283rd Judicial District Court; Honorable Larry Baraka, judge of Criminal District Court Number Two; Honorable Ralph Tate who, at that time was chief public defender; Mr. Norman Kinne,. first assistant district attorney of Dallas County, Texas; Mr. Paul Macaluso; the Honorable Harold K. Entz who, at that time, was County Criminal Court Number Four and is presently judge of the 194th judicial Court; the Honorable Ed. Kincaide who, at that time, was judge of the 194th Judicial District Court and is presently on the Court of Appeals district sitting in Dallas Texas; John Stauffer.

We would also, in support of our prima facie case, offer Defendant's Exhibits Numbers Four, Five, Six, and Seven which were offered during the motion to quash the jury panel because of the systematic exclusion of black minorities and the motion to suppress which the Court overruled and

denied and exception was taken thereto, We ask that all the testimony and exhibits that were offered during that hearing be introduced for the purposes of establishing our prima facie case.

We would therefore suggest to the Court that Defendant Thomas Joe Miller-El — may I have a minute, Your Honor?

THE COURT: Surely.

MR. CUNNINGHAM: Your Honor, could we have a [8] ruling on the offer of testimony and the offer of proof, Defendant's Exhibits Four, Five, Six and Seven?

THE COURT: Mr. Keck, what is the State's position?

MR. KECK : Well, judge—

MR. CUNNINGHAM: And the testimony.

THE COURT: Is that on the motion to quash that we heard pretrial?

MR. CUNNINGHAM: Yes, sir. This hearing was conducted after we had completed the jury selection process.

MR. KECK: Judge, we would object to the Court considering any of that evidence. Unless we are mistaken, and we're confident that Mr. Cunningham and Mr. West will correct us if we're wrong, all of that evidence, the testimony of those listed individuals beginning with Justice Farling and also those exhibits, that all went to establishing past racially-based exclusion of minorities in Dallas County. We don't, incidentally, feel that it established that historical fact. The Court recalls that testimony, I guess, but the point is, Batson itself is directed at the prosecutor's conduct in the instant case.

It would be our position, even if every one of these people had testified no black had ever served in Dallas County in the past, that testimony, however [9] historically and accurate it might be, would be irrelevant to the Court's inquiry of the instant case. The reason that we can inquire when it is appropriate to inquire into the prosecutor's reasoning in the instant case was, as I'm sure the Court recalls, in Batson

the Supreme Court said that this historical approach was too difficult for defendants to meet, that it was impossible for them to amass the statistical kind of evidence needed to come up to a Swain versus Alabama type of showing and that's why that evidentiary method was jettisoned by the Supreme Court of the United States.

It is not my position, necessarily, that one can no longer make out a Sixth Amendment claim by showing that kind of historical record, but it is my contention that type of historical record has no bearing on a Batson hearing and this case was remanded to this court exclusively for a Batson hearing. At this time there is absolutely no reason for this Court to consider what may have happened in any case tried in the past in Dallas County or, for that matter, any case tried in the future after this case was tried. All those things are irrelevant and even if they could show no black ever served before or since, in order to get a Batson remedy, they're going to have to show that in this case we struck jurors based on racial motives. If they can't do that, they will lose this [10] hearing.

MR. CUNNINGHAM: Your Honor, in response to that, Defendant's Exhibit Number Seven was a list of the ten black jurors that were actually struck in this case. That's what one of our exhibits was, Defendant's Exhibit Number Seven. Defendant's Exhibit Number Four was the Dallas Morning News for March 9, 1986, which had information in there about the selection process. Defendant's Exhibit Number Five was the Dallas Morning News for March 10, 1986 and Defendant's Exhibit Number Six was the Dallas Morning News article on March 11th, 1986.

We would further say that Batson clearly says that the defendant may rely upon any other relevant circumstances which raises an inference that the prosecutor used the selection practice to exclude the venireman from the jury on account of their race. That is what we suggest. That motion, our motion to quash the jury, which was held after the jury selection process in this case, because of the systematic exclusion of black minorities, we can rely upon those relevant

circumstances. We can further rely upon the facts as to which there can be no dispute that preemptory challenges constitute a jury selection process that permits those to discriminate who are of a mind to discriminate.

THE COURT: Mr. Keck, again, I'm going to **[11]** overrule the State's objection to that evidence being before the Court, this Court, on this hearing. What weight, if any, I will give it, I certainly reserve for myself. Just so that the record is whole and the Court of Criminal Appeals wishes—it has got it already in front of it, I assume. That material went down. Particularly the hearing on the motion to quash the panel went down with the record, I'm sure, did it not?

MR. KECK: Yes, Your Honor.

THE COURT: Of course, the record is clear that I denied your motion to quash the panel at the end of that hearing, so I've already made a determination there. Again, in an abundance of caution, I will admit the evidence. Whether or not I will give it any weight is another question.

MR. KECK: Your Honor, if that concludes the stipulations offered by —

MR. CUNNINGHAM: I think at this point is where the Court decides whether or not we have made our prima facie case. We would ask the Court to—rule as to whether or not we have made our prima facie case.

THE COURT: Mr. Keck, do you want to argue on that point?

MR. KECK: Yes, Your Honor. I believe that in a typical Batson situation that might very well be true. **[12]** However, here the Court has the benefit of not only now having read the Batson opinion and Keaton and some of these other cases decided by the Court of Criminal Appeals, but it also has the advantage of knowing, I guess, because we have already been through one hearing on this topic, of essentially what is going. to be produced.

Specifically, the Court knows that, while the State exercised fourteen preemptory challenges, it had fifteen preemptory challenges. The Court knows that one black served on

this jury and that had continued to it from that, that had the state of mind to exclude blacks, that it certainly could have excluded the one back who did serve on the jury. The Court also knows that the racial composition of the jury consisted of members of other minority races. Finally, the Court knows that the Defendant agreed to the excuse of six members of the black race in exchange for the State, I presume, to excuse other veniremen. We think the Court should consider the ultimate composition of the jury because it knows what that is now and we think the Court should also consider the fact that the Defendant agreed to the excuse of these six black veniremen when it decides —I mean, I take it the thrust of the Defendant's complaint is I was tried by a jury on which there was only one black person. Part of that is—part of our point would be, the **[13]** reason there is only one black person was because you agreed to excuse six black people. Now, that's not the only reason, the only factor. There is also the State's exercising its preemptory challenge.

We would suggest that all of the relevant circumstances, just as Mr. Cunningham has said, all of the relevant circumstances surrounding the case, can be considered by the Court when it makes its determination of whether or not there is a prima facie case. We would suggest that those facts also ought to be considered. We are not suggesting that the explanation should be considered at this point. We would agree that that is—you know, in the typical course of a Batson hearing, that is not the way it would proceed. But these other factors relevant to the racial composition of some of these other groups we feel is before the Court and ought to be considered by the Court.

MR. CUNNINGHAM: Your Honor, in response to that, Batson clearly points out the facts that you may have one black. That is not the issue. The issue is whether or not the Defendant has—well, whether or not there has been a discriminatory selection process. That is our contention with respect to the ten that they used preemptory strikes on. It becomes even clearer, when the Court looks at the number

of strikes that were actually **[14]** used, fourteen, and then see that out of that fourteen ten were black. To say that there was a black, there was a Philippino, there was a Mexican, and there were two or three women that answers the problem, is not the answer because all the State could do is say, okay. We' re going to see which one we want and put him on there and that kills this Batson hearing. That is not Batson. They have to clearly show a specific reason for their use of preemptory strikes on each and every one of the minority, in this case black. The fact that they had one on there don't make any difference. I think that is Batson clearly.

MR. KECK: Judge, I'm not saying that just because a black served on the jury that answers the Court's inquiry. I'm not saying that, but I am asserting that is a factor that this Court can consider along with the fact that we had remaining preemptory challenges to exercise against that black venireman, so we have a situation in which blacks and other minorities served on the jury. To the extent that the State had unutilized preemptory challenges, it could have excluded all blacks from the jury. Now, it got some help from the Defendant's agreeing to excuse six other veniremen, but I'm just saying those are all factors that the Court should consider in determining whether these facts and circumstances raise an inference that the State exercised the preemptory **[15]** challenges that it did exercise against blacks based—you know, by virtue of a racially motivated reason.

THE COURT: Mr. Keck, I'm going to resolve this this way again maybe just because I'm extra cautious, because I think the Batson rule is still being expanded by the Court of Criminal Appeals. Keaton is the closest we've come to having a clear pattern of what to do. I'm going to ask and direct the State to go forward with an explanation of its strikes.

I will ultimately, of course, make the determination as to whether a prima facie case was even established or, if it was, whether or not the State's reasons were racially neutral and then, depending on what I do there, anything else if I go

that far. But I think a whole record is the thrust of the Court of Criminal Appeals' order.

I do note, unless you lawyers object—I kept notes during the voir dire myself and you mentioned six blacks were apparently excused by agreement. My notes indicate those were jurors seventeen, thirty, fifty, sixty-one, sixty-seven and eighty.

MR. CUNNINGHAM: What were they again?

THE COURT: I will give you the numbers. I have juror number seventeen, Mr. Gitchaway; number thirty, Mr. Randal; number fifty, Ms. Miller; number sixty-one, Mr. **[16]** Moseley; number sixty-seven, Ms. Collier; and number eighty, Mr. Tarry. Those are by agreement.

The record also probably needs to reflect from my same notes that in excess of sixty jurors out of a hundred and eight who were voir dired were excused by agreement. To go further, my understanding was, some of which is probably not on the record, by giving the various questionnaires to all the jurors, counsel on both sides, under the direction and instance of the Court, encouraged the lawyers to try to agree to excuse jurors who would like to be struck for cause or excused for cause if they were actually voir dired. I think both sides worked toward that end and only voir dired those jurors who appeared to be potentially seated jurors. For whatever value that is, I do not know.

At any rate, Mr. Keck, I would ask and direct the State to go forward with its explanation of striking those ten particular jurors. In doing so, I will say that I certainly will consider in making whatever rule I make in this case all of the voir dire including the composition of the jury, the agreements to excuse. I'm going to rely on my own recollection which might be refreshed by my own notes of various jurors and anything else that is before me. I want this to be a complete record.

Off the record, Pam.

[17] (Whereupon, an off-the-record discussion was held between counsel and the Court.)

THE COURT: Back on the record. Mr. Keck, do you want to go forward?

DIRECT EXAMINATION OF PAUL MACALUSO

BY MR. KECK:

Q Would you State your name, please?

A Paul Macaluso.

Q Would you tell the Court how you are employed, please?

A I'm an assistant United States attorney for the Northern District of Texas.

Q How long have you been so employed?

A Since the first of the year, basically.

Q That is 1988?

A Yes.

Q How were you employed prior to that?

A I was an assistant district attorney for Dallas County, Texas.

Q How long were you employed in that capacity?

A From February of 1973 until the first of this year, 1988.

Q Let me ask you if you are familiar with the case which has resulted in this retrospective Batson hearing, that case being the State of Texas versus Thomas Joe **[18]** Miller-El, Cause Number F85-78668-NL?

A Yes.

Q And did you have anything to do with the prosecution of that case?

A Yes.

Q Would you state for the record, please, what your duties in that regard were?

A I was one of three, basically three, assistant district attorneys assigned by the district attorney to prosecute that case.

Q I see. Who were the other assistant district attorneys?

A Mr. Norman Kinne was the lead attorney on the case, myself, and Jim Nelson.

Q Directing your attention to the voir dire examination, was Mr. Kinne present during that voir dire examination?

A Occasionally.

Q Was there any particular problem that he had; was he just preparing for trial or —

A I am assuming he was interviewing witnesses and he had other responsibilities as well. The voir dire, as I recall, took several weeks.

Q Was that kind of part of the game plan, that you-all —that you and Mr. Nelson would concentrate on **[19]** the voir dire and Mr. Kinne would then be lead counsel during the trial of the merits?

A That is correct.

Q From time to time did you, however, consult with Mr. Kinne about the exercise of certain of the State's preemptory challenges?

A Occasionally.

Q Not very often?

A Correct.

Q That would be rare, in fact, that you would do that?

A Pretty rare.

Q Let me direct your attention to—well, I'm sorry. Let me go over a couple of more general matters. As you and Mr. Nelson were interviewing the jurors through the voir dire process, let me first ask you whether or not there were jury questionnaires utilized in this case?

A Yes, there were.

Q Those were written forms?

A Yes, sir.

Q And they were passed out to the jurors prior to the time they appeared to be individually examined?

A Yes, I believe in every instance, virtually every instance.

[20] Q And copies have been made of those of the answers that they had written onto the forms and then those copies have been provided to attorneys for both parties and to the

Court?

A Yes.

Q Let me ask you if you had an occasion this morning to review the rather large box containing the district attorney's trial files concerning this case?

A Yes.

Q Were you able to find the State's copies of the juror questionnaires in that box?

A Some.

Q Were you able to find any of the questionnaires relating to the jurors who were preemptorily challenged?

A No, sir.

Q Did the forms that you have relate to the jurors who, in fact, served—or the veniremen who, in fact, became jurors on the jury?

A Yes, that's correct.

Q When you and Mr. Nelson were devoting your attentions to this process, who between you was the senior attorney assigned to the case to represent the State?

A I was.

Q Prior to this trial, how many capital penalty juries have you selected yourself or participated in the **[21]** selection of?

A I don't know for sure, but I—

Q Just a rough guess.

A Ten maybe, maybe more, maybe less.

Q How many had Mr. Nelson selected, if you know?

A I don't believe he had done any. This was his first.

Q So you kind of took the lead?

A More or less.

Q Let me ask you: Did you ever come to a point in deciding whether or not to exercise a State's preemptory challenge, that you and Mr. Nelson disagreed about whether or not a preemptory challenge should be exercised against a particular venireman?

A Not that I can recall.

Q If such an eventuality had occurred who, between you and Mr. Nelson, would have been able to make the decision on behalf of the State of Texas?

A In all probability I would have.

Q And possibly you might have consulted with Mr. Kinne in a close situation?

A That's possible, yes.

Q All right. Let me direct your attention then to venireman number one 0 two. That's Mr. Paul Bailey. I believe yesterday afternoon after the Court had instructed **[22]** its coordinator to call me and inform me that we were having the hearing on this matter this morning, you and I met outside the federal courthouse and I gave you a copy of the court reporter's transcription of the voir dire of Mr. Paul Bailey; is that correct?

A Yes, sir, that's correct.

Q It was in a plain brown envelope which I see you brought with you to the witness stand?

A As you see it, yes.

Q I would like to direct your attention, if I could, to page 4167 of that document.

THE COURT: What juror was that?

MR. KECK: This is Paul Bailey, Your Honor, number one 0 two. This is one of the venireman where no explanation was actually given in the record.

THE COURT: We're assuming that I'm going to review the voir dire record for explanations plus anything else I hear at this hearing?

MR. KECK : Your Honor, as to the explanations which we are giving, as to the eight black men for whom explanations appear, it is my intention to ask the Court simply to take judicial knowledge of those things. I have asked Mr. Nelson to come in simply so that he can be here for any questions the Court might want to ask him about those reasons. If the Court pleases I can have Mr. Nelson **[23]** read those reasons into the record.

THE COURT: They are in front of me. I've already reviewed them preparatory to the hearing today. I will be glad, of course, to hear anything else you want to say but, if we can focus on what we have to have, it would be better for everybody.

Q (By Mr. Keck) Now, have you found that passage in your copy of the statement of facts?

A I've found page 4167.

Q All right. Would you —

MR. CUNNINGHAM: Could we take a minute, Your Honor—could we get your copy back there?

THE COURT: Sure.

(Whereupon, there was a short break, after which the following proceedings were held.)

THE COURT: Let's get back on the record. Mr. West was excused because he had a matter that he had a conflict with and Mr. Cunningham has, of course, no problem with continuing the hearing.

MR. CUNNINGHAM: None whatsoever, Your Honor.

THE COURT: Go ahead, Mr. Keck. I think when I interrupted you-all, Mr. Macaluso was just about to be asked about his reasons for challenging juror Bailey.

Q (By Mr. Keck) Mr. Macaluso, early on in your **[24]** examination of Mr. Bailey, you had begun questioning him about his beliefs about the death penalty and he had indicated certain religious or personal reservations about imposing the death penalty. You had, in fact, challenged Mr. Bailey based on Witherspoon versus Illinois and Wainright versus versus Witt; is that basically correct?

A Yes.

Q Defense counsel examined Mr. Bailey on this point and finally on page—the page that is directing your attention, the Court even indicated on line twenty-two and twenty-three on page 4167—could you read that to the Court just to remind the Court of what was said?

THE COURT: Do you have the record now?

MR. CUNNINGHAM: No, sir. I will use his when he finishes.

Q (By Mr. Keck) Page 4167, beginning with line twenty-one, really.

A "THE COURT: I'll give you-all a few minutes. It's a good question that has been raised." Then parenthetically, "(Whereupon, there was an off the record discussion between counsel and the Court, after which the following proceedings were held.)" "THE COURT: Mr. Macaluso, I'm going to hold that he is qualified. I respectfully disagree with the State on it." It just says, "MR. MACALUSO: Judge, in light of the Court's ruling and **[25]** in light of the statements made by the Court, we'll use a preemptory challenge.

Q Now, let me ask you, Mr. Macaluso, at that point the Court had overruled this Witherspoon challenge after having indicated that the Court at least felt it was a good or a close question and at the point that you exercised the preemptory challenge, let me ask, you why you did that as to Mr. Bailey?

A From the record, which I have reviewed, it became obvious—I'm just rereading the record—from the very beginning that Mr. Bailey had expressed religious, moral, and personal views in opposition to the death penalty. I thought he was very explicit about that. I felt at the beginning of the examination, throughout the examination, and at the end of my examination that's how he felt even though he did change his position somewhere after he was examined by

change his position somewhere after he was examined by Mr. Cunningham. I just felt that he would not be able to fulfill his responsibilities as a juror in light of any evidence and I exercised a preemptory challenge.

Q In any event, he wasn't, in your view, an ideal State's juror by any stretch of the imagination?

A Definitely not.

Q Because of these reservations he had about the imposition of the death penalty?

[26] MR. CUNNINGHAM: Judge, object to counsel leading.

THE COURT: Don't lead.

Q (By Mr. Keck) Let me direct your attention then to—I'm sorry. Did the race of Mr. Bailey play any role whatsoever in your decision to exercise a preemptory challenge?

A None whatsoever.

Q If anyone, regardless of race, had given similar answers to his, is it your testimony that you would have utilized a preemptory challenge on such a venireman?

A Without question.

Q Even if it was your last preemptory challenge? I know it wasn't in this case, but —

A No, it wasn't. I have never been in that position but, yes, I would have to say—I guess I'm speculating to a degree but, yes, I would have had to given his statements in opposition to the death penalty.

Q Now, directing your attention to Venireman Joe Warren, which was the other venireman that I provided you a copy of that voir dire—

MR. KECK: Your Honor, this is the other venireman for whom no explanation was given.

THE COURT: What number was—

MR. KECK: He was number twenty-eight, Your **[27]** Honor.

Q (By Mr. Keck) Now, Mr. Macaluso, Mr. Cunningham has already stipulated that this was juror number twenty-eight and that this was the State's number six preemptory challenge; in other words, the sixth preemptory challenge exercised by the State in toto on Mr. Warren. Would you describe that as early or late in the voir dire process?

A I would describe it basically as early.

Q Would you state for the Judge—I'm sure he is probably familiar but also for the record and the Court of Criminal Appeals. Would you just briefly detail perhaps how your philosophy about exercising strikes changes as we go through the voir dire process from early voir dire to late voir dire, if there is a change?

A Sure. Naturally I prefer to think that I was being conscientious and careful throughout a serious process such as this. I think it is inevitable that early on when you're starting off, of course, examining prospective jurors and you have fifteen strikes that you have the, I don't know if you could call it, luxury for lack of a better phrase or word of using strikes and being extra careful, I suppose.

I'm sure, if I were to go back and examine strikes that I exercised early on in voir dire, I might have found—in fact, I have had judges kind of kid me **[28]** about exercising a strike on somebody who, I later said, I wish I had that strike back later on because you never know what kind of a venire person you're going to encounter later on in the examination.

In answer to your question partially, yes, you're probably more likely to use a strike early on on somebody and you would obviously come down to having used twelve or thirteen. It is just more precious, I guess, is a way of putting it.

Q Of course, the other fact is, you're counting jurors who have actually been selected, too?

A Sure. I left that out. Of course, obviously if you have used twelve or thirteen strikes and you have eleven jurors, that's one thing. If you have used nine or eight strikes and you have two jurors, it is quite a bit different.

There is a ratio, I suppose, of the number of strikes you have remaining to the number of jurors you need to complete the jury.

Q Now, directing your attention back to Mr. Warren, just to we understand, in light of that explanation that you just gave, Mr. Warren's—the decision on Mr. Warren came at a point in which you probably weren't being extra careful—

A Yes.

Q — for lack of a better word?

[29] A I guess you could say that.

Q Because you still had nine preemptory challenges left even after exercising against Warren?

A I don't recall exactly where in the voir dire examination this particular venire person fell. Assuming that the pages are numbered such this page is in the low fifteen hundreds and Mr. Bailey was number forty-one hundred, so there would be some significant distance before Mr. Bailey.

Q Mr. Bailey, just to refresh your memory, was juror number a hundred and two. Mr. Warren was juror number twenty-eight. I realize that they were probably not all called exactly in order, but —

A No, and some jurors were excused.

Q Twenty-eight might be even called before twenty-seven?

A Right.

Q Would you state for the Court your reasons for ultimately exercising a preemptory challenge against Venireman Warren?

A I have had a chance to review what appears to be about forty pages of my examination of Mr. Warren and the examination by Mr. Cunningham, I believe. I have noted a few things that tends to refresh my memory with regard to our decision in this case. I'm looking at page—for **[30]** example, on page 1543 at the bottom there at line twenty-three where he was asked by me, "I gather you feel pretty

strongly about murder, do you not? I mean, it goes without saying?" His answer was, "well, it's just like I said, you know. There are cases, I mean, personally, that I feel I wouldn't want to personally be, you know, involved with it if I had a choice, but as far as the case, you know, if I feel that you can avoid it, you know, I think you should." He had some answers there, and I've got some other pages marked, that made references to—I thought they were inconsistent responses. At one point he says, you know, on a case-by-case basis and at another point he said, well, I think—I got the impression, at least, that he suggested that the death penalty was an easy way out, that they should be made to suffer more. Again, I don't have the benefit of the questionnaire itself. Frequently we have information on there that kind of guides us on some of the questions we ask.

He goes on in, I believe, some of the examination by Mr. Cunningham—and I imagine this would be on the questionnaire, if it were filled out. He makes reference to a brother, I believe, who had been recently convicted. By the way, the section I was referring to just a moment ago about these unusual feelings he had about whether someone is really being punished by the death **[31]** penalty or not and ambivalent to—on page 1532 basically lines nine through seventeen.

Q Could you just read those, Mr. Macaluso, so we could all be reminded of them?

A I assume I'm asking about what the death penalty accomplishes and the question before that was, "What do you think it accomplishes when you feel it does?"

Answer, "I don't know. It's really hard to say because I know sometimes you feel that it might help to deter crime and then you feel that the person is not really suffering. You're taking the suffering away from him. So it's like I said, sometimes you have mixed feelings about whether or not this is punishment or, you know, you're relieving personal punishment."

Back to what I was referring to about—and I believe it is in response to some questions by Mr. Cunningham on page 1556. On line four there is a reference to apparently some-

thing that had happened to the venire person's son. There is a question beginning on line four, a question by Mr. Cunningham, "This mishap that your son was involved in, was that Bengy or Joe, Jr.?" Answer, "That was Joe, Jr." Question, "Did anything happen as a result of that that might affect your decision if chosen as a juror in this case, sir?" "No."

It goes on, question, "That was something at [32] school?" "Yes, it was." I don't recall in reading my examination of Mr. Warren any mention in particular was made of that initially. I don't know how the time ran on that, but I gather there was something on the questionnaire. I don't have the questionnaire before me nor have I had a chance to see it before I testified here.

At the bottom of page 1556 beginning with line twenty-four, actually line twenty-two, question, "Was your brother-in-law a victim of a crime in Las Vegas?" Answer, "My brother. Yes." "Okay. What type of crime was it?" Answer, "I don't know the details of it, sir. He had to make restitution of some money. It involved some food stamps or something, but I don't know all the details of it. He was convicted and got a probated sentence. He had to make restitution of some money."

Question, "How long ago was that, sir?" Answer, "That was about a year and a half or two ago."

Those are the basic reasons. Without the benefit of the questionnaire, we just felt that he—you know, at that juncture and at that point in the voir dire examination with nine strikes remaining, we thought it would be best to exercise a preemptory challenge. We did not think he would be a favorable juror for the State.

Let me ask you the same question that I asked you about Mr. Bailey, if this particular venireman, that is [33] Mr. Warren, had presented himself at a time in which you have one more challenge to exercise, one more preemptory challenge, would you have been as likely to think about utilizing it?

A No, I would not have.

Q Also, part of it was just at this point in voir dire Mr. Warren gave his answers and he was not as clearly disfavorable to the State as Mr. Bailey?

A That's correct.

Q And I think you have indicated that Mr. Bailey was, in your judgment, pretty—about as unfavorable as one could get?

A To the point that we submitted him for cause.

Q With regard to Mr. Warren, did the race of this venireman play any role whatsoever in your decision to exercise a State's preemptory challenge against him?

A No.

MR. KECK: Your Honor, we will pass the witness.

THE COURT: Mr. Cunningham, do you wish to cross-examine?

MR. CUNNINGHAM: Yes.

MR. KECK: Your Honor, could the record reflect that I have tendered to Mr. Cunningham the State's copies of the transcript of the voir dire of both Mr. Warren and Mr. Bailey. He has those available to him for cross- [34] examination or whatever purpose he would like to use them.

THE COURT: Mr. Cunningham, do you need any time to look through those?

MR. CUNNINGHAM: My understanding is that the . Court is going to review those?

THE COURT: Correct. Before I decide anything in this case, I will would like the opportunity to reread the testimony myself at least of these two jurors and probably all of the jurors that were challenged.

MR. CUNNINGHAM: Just so the record will reflect, they were submitted to counsel for the Defendant while the hearing was in process.

CROSS-EXAMINATION OF MR. MACALUSO

BY MR. CUNNINGHAM

Q Mr. Macaluso, did I understand you to say that the reason why you may exercise a preemptory challenge early in the selection process may differ when you have used a large number of your preemptory challenges?

A That's correct.

Q So that you start out in the beginning and your selecting process in the beginning—for example in this case beginning on February 5, 1986, when you struck Mr. Bozeman and when you struck Mr. Bailey on March 5, 1986, Mr. Bozeman being number one and Mr. Bailey being with thirteen strikes, your reason for striking Bozeman vis a **[35]** vis Bailey is different?

A That would largely be true. The same considerations are made but I—that largely would be true.

Q So that the more strikes you use and the least number that you have affects how you look at a prospective juror and particularly a black juror as the process goes on?

A No, not with regard to a black juror in that consideration or any other color juror, for that matter. something else is left out. It is just not the number of strikes. As Mr. Keck pointed out, it is the number of jurors that remain to be seated. I can recall, for example, a situation in this particular case where I can recall vividly one of the persons who was on this jury, I will be honest with you, I would have struck him. If he had been in Mr. Warren's position, I would have struck him faster, if there is such a thing, than I did Mr. Warren.

Q You said what?

A I can recall there was a juror on this case that I would have—that we accepted. I think he was either the eleventh—I believe he was the eleventh juror, maybe the tenth juror. I can't recall which, but way on in the process, that I would have —

Q I can't hear you for that door. Now, you were **[36]** saying?

A I was saying that I can recall specifically—I can recall two people that I probably would have struck if they had

appeared in the array earlier on, say, if they had switched places and been number twenty-eight where Mr. Warren was. I can recall two individuals that, if I had them occur then, I would have struck them. It occurred later on when we had more seats to fill, we had fewer strikes, and I had to take a chance on them.

Q Were these people that you are talking about actually selected?

A Yes, sir.

Q One of them was a Philippino?

A No.

Q One a Spanish sir name? [sic]

A He had a Spanish sir name. [sic]

Q So the other one was a black?

A No. It was a white female.

Q Was that juror number twelve?

A I think we're thinking about the same person.

THE COURT: Juror number one 0 eight, I believe.

Q (By Mr. Cunningham) Ms. Sandra Hearne?

A Nothing personal against either of those jurors, I might add.

Q You did not strike Ms. Sandra Hearne, juror **[37]** number one 0 eight?

A If she was the last juror seated, that's the one.

Q She was the last juror seated.

A Right.

Q And was seated when you had one strike left; is that correct?

A I would have to take your word for it. I'm not denying that it probably is accurate. I think she was the last juror seated. I think we did have one strike left.

MR. CUNNINGHAM: That's all, Your Honor.

THE COURT: Is that all, Mr. Keck? I just have one question that may already have been asked, but why don't

you go ahead and finish. I just have a couple of questions which you may have asked and I just didn't hear them.

REDIRECT EXAMINATION OF MR. MACALUSO

BY MR. KECK:

Q Mr. Macaluso, just so we understand, as voir dire progresses, I didn't understand you to say that your feelings about any particular venireman changed. In other words, you like them or dislike them just as much as you would have, but your reluctance or eagerness to exercise a pre-emptory challenge against this sort of marginal venireman, that may change as the voir dire progresses and **[38]** you have used more of your challenges?

A That would be true. A large part of it or at least a substantial part of it is that as things begin to wind down, as you get eight, nine or ten jurors, you can better calculate obviously. You know how many people you need and how many strikes you have left. You can look down the list of people that you have questionnaires, which we examine, and we can make some judgment calls on people we feel would be better suited towards the case in our opinion. We can better estimate how many strikes we're going to need and take those into consideration and some of the strategies that come into play, I'm sure, on both sides in that regard in using strikes at that time. It is much more difficult to do early on in the voir dire.

MR. KECK: Thank you.

RECROSS-EXAMINATION OF MR. MACALUSO

BY MR. CUNNINGHAM:

Q Mr. Warren did not say anything that indicated to you that he would be unfair to the State?

A Well, he didn't say in so many words, no, but I have to go just from my review of his examination on the basis of some of his answers and some of his positions and the other information about his having some family members who had either been convicted of crimes or were on probation or whatever, that I felt he would be more biased **[39]** towards the Defendant in the case.

MR. CUNNINGHAM: That's all, Your Honor.

EXAMINATION OF MR. MACALUSO

BY THE COURT:

Q Mr. Macaluso, you have testified to your strategy in selecting the jurors in a capital murder case. And you have participated in voir dire in capital murder selections; is that correct?

A In others?

Q Yes.

A Yes.

Q Can you give me any number?

A How many all total?

Q A ball park figure.

A Maybe fifteen—not as of that time. Maybe ten at that time.

Q This may not be relevant, but maybe it ought to be in the record. I believe our manner of doing voir dire was to bring up fifty jurors each Monday, to qualify fifty, and then commence to conduct voir dire through that list and then at the end of the week quit and bring up fifty new ones on Monday. Is that how we did this case? Did I recall it correctly?

A Yes.

Q Which again may or may not affect the strategy **[40]** of either side in exercising their strikes; in other words, not knowing what is going to come the next Monday?

A I don't recollect there was a special venire in this case.

MR. CUNNINGHAM: There was not a special venire. In fact, we started with a brand new panel the following Monday.

A I do recall now that I believe Mr. Nelson and I would alternate with Mr. West when making shuffles, I believe, down in the central jury room on the various Mondays.

Q I recall many shuffles. That's why I asked that question.

MR. CUNNINGHAM: There was a shuffle each Monday.

THE COURT: That's all I have.

MR. CUNNINGHAM: This is also true, I think, that if there were ten, eleven, or whatever the number was, that were not reached when we broke on Friday, every one after that number was excused from service.

THE COURT: I think that is true.

MR. CUNNINGHAM: And then on Monday we started the process all over again with a brand new panel.

MR. KECK : Your Honor, before Mr. Macaluso is excused I should mention that, in fairness to Mr. **[41]** Cunningham, I intend as to Venireman Bozeman, venireman number seven, to ask the Court to take judicial notice of the explanation that was given for the exercise of the State's preemptory challenge against Mr. Bozeman. That explanation was given by Mr. Macaluso and it appears in volume number one, really, of the voir dire, which is page 323 and 324, according to my records.

THE COURT: You have set that same matter out in your motion for rehearing your brief. Is that what you are referring to?

MR. KECK: Yes, Your Honor.

THE COURT: I have that in front of me.

MR. KECK: I mention it only so that perhaps we can excuse Mr. Macaluso. I did mention it in the brief, but I have the reason here—it may be that Mr. Cunningham would like some opportunity to cross-examine Mr. Macaluso on that reason before he leave the stand. Mr. Nelson provided the State's reasons for the exercising of the State's challenge as to the other seven veniremen. He is also available to be cross-examined. I just thought we might give Mr. Cunningham that opportunity now.

MR. CUNNINGHAM: Your Honor, if I had wanted one, I would have used —

THE COURT: Beg your pardon?

MR. CUNNINGHAM: As far as I am concerned, Mr. **[42]** Macaluso can be excused if the State has no further questions they want to ask him. The defense has asked him all the questions they want.

THE COURT: Anything else, Mr. Keck?

MR. KECK: No, Your Honor.

THE COURT: Mr. Macaluso, you can be excused. Thank you, sir.

Mr. Keck, does the State have any additional evidence it wants the Court to consider on the hearing?

MR. KECK: Not at this time, Your Honor, other than the fact that we would like the Court to take judicial notice of all of the explanations for the other eight veniremen. Those are set forth in our motion, but you might want to write down—I'm not sure that it says as to all of them the specific place in the record.

Now, the State and the appellant used a numbering system for the—because of the edition of the transcript, there may have been two transcripts or a preliminary hearing that was also reported, but the numbers that I have used in my brief do not correspond to the numbers of the voir dire. For example, the volume number ten of the voir dire, we refer to in our brief as R-12. In other words, there are two more added onto it. There are references in my motion that reflect the two plus, if you will, system of indicating the volume of the transcription.

[43] As to Anna Keaton, the explanation provided by Mr. Nelson to the Court is found at volume thirteen, page 4373.

MR. CUNNINGHAM: Wait a minute. Volume thirteen, page what?

MR. KECK: Page 4373.

THE COURT: That is the numbering system that is in the Court of Criminal Appeals'; is that correct?

MR. KECK: Yes, Your Honor. If you went back and looked at these volumes, it would appear to be like volume eleven, Volume XI.

MR. CUNNINGHAM: Where do you get thirteen?

MR. KECK: Well, we call this R-13 because, you know, R-1, our transcript—I think maybe there were two transcripts or maybe there was some preliminary hearing even before voir dire that was really R-2. See, what I'm getting at is, it says ten but really we both called it R-12. On the cover of it, it says volume ten of voir dire.

With regard to venireman Mackey, the explanation is found at Roman numeral thirteen, 4374. I believe also at that page, the Court itself recognizes that it can see that juror Matthews is not an ideal juror although the challenge for cause is overruled by the Court.

We've already gone over Juror Bozeman. With regards to Venireman Fields, that explanation is found at **[44]** page 450 of the first volume of the voir dire. That's R-3. Again, that explanation was provided by Mr. Nelson. I think that explanation is perhaps reiterated in the State's motion that the Court has been provided with.

With regard to Venireman Rand, that explanation by the State is found at Roman numeral six at 1855 and 1856. I believe that is also set forth in our motion, judge. The voir dire of Venireman Rand begins at 1805, Your Honor.

With regards to Venireman Bogges, number forty, the explanation given by the prosecutor, again that was Mr. Nelson in giving the explanation, is at Roman numeral six, 2043.

With regard to Venireman Kennedy, Mr. Nelson's explanation appears at our Roman number seven dash 2939 through 2940 and I believe that is also reproduced in our brief, Your Honor.

The final explained venireman that Mr. Nelson provided explanations at volume ten, page 3017 through 3018.

We would ask the Court to take judicial notice of all those explanations and we would submit that they were given at a time that the prosecutors had both discussed the mutter and reflected the contemporary reason before this case has been remanded. I would also like the **[45]** record to reflect that I know the Court whenever it recesses has seen Mr. Nelson and Mr. Nelson has been in the witness room and he is ready to be cross-examined on any of these reasons by Mr. Cunningham if that is his desire. I don't think it would serve the State's purpose or interest to examine him seeing as the reasons are all in the record and available for the Court's consideration.

THE COURT: Thank you, Mr. Keck. Mr. Cunningham, I will give you a chance to reply to any of that, if you wish, but are both sides prepared to close evidence now?

MR. CUNNINGHAM: Yes.

MR. KECK: Yes, Your Honor.

THE COURT: I'm going to, of course, reread the voir dire of the ten challenged jurors. I did read some of it already after you filed your earlier motion with the Court of Criminal Appeals. I found what I read consistent with your summary and your motion, so I don't suspect that it is not accurate.

Do you-all wish to make argument on this at this point in time? I don't know if this is particularly a fact-finding hearing as I understand the Court of Criminal Appeals' mandate, but I certainly think there is a position that one side or the other can take.

MR. KECK: Your Honor, I would just submit to **[46]** the Court that the Court itself—and you might also want to make a note of this: At page our Roman numeral fourteen dash twenty-two, the Court found that on every strike where the defense asked for an explanation, the State has provided satisfactorily to the Court it as not being racially motivated. That was before Batson came down, before anything that maybe challenges or changes the way the Court is thinking about things. I think that is an important finding.

As to those eight veniremen, black veniremen, who were peremptorily challenged by the State, this Court at the time the matter was fresh in its mind felt that the prosecutor's explanations satisfied the Court that they were not racially related reasons.

In Keaton versus State—now, this is the last Keaton, Keaton number three, the one that was decided on April 6th, 1988. I know the Court has read this. On page eight and nine, the Court of Criminal Appeals in Keaton refers to these five factors which will weigh heavily against the legitimacy of any explanation which is offered by the prosecutors. Those factors are, first, that an explanation based on group bias where the group trait did not show to apply to the challenged juror specifically. I would submit to the Court that there has been absolutely no indication that any of the explanations are subject to this first factor.

[47] Second, that no examination or a perfunctory examination of the challenged juror. Again, I would submit that the court can see that all of these black veniremen were examined extensively. This isn't a situation where the State just asked a few questions of the black veniremen and then struck them. The implication of that, of course, would be, well, we were going to strike them all along because they were black. That certainly didn't happen in this case.

The third factor, just for an examination of the challenged juror, i.e., questioning a challenged venire person so as to evoke a certain response without asking the same question of other panel members. Here there probably were certain questions that were asked of certain of these black veniremen who were challenged by the State that were not asked of all the veniremen. But to the extent that that occurred, the State would suggest that—for example, Mr. Bailey, he had indicated on his form, and it is clear through the whole context of his voir dire, that he had his opposition to the death penalty.

Of course, the white and other nonwhite veniremen who didn't make those responses, they weren't questioned about them as thoroughly—or heir feelings about the death penalty as thoroughly as the jurors who did indicate a reservation about imposing the death penalty. **[48]** Our point would be, to the extent that there was a just for examination, it can be explained by nonrace-related factors. Probably in most cases, the jurors answered these questions that the prosecutors testified they relied on.

The fourth factor, the reason given for the challenge is unrelated to the facts of the case. I think there is none of these situations where it can really truly be said that the reasons given were not somehow related to the facts of the case.

Finally, this is for a treatment where there is no difference between the responses given in an unchallenged venire person. At no time has the Defendant urged that there are unchallenged venire persons who did not have these same traits that the prosecutors testified either at trial or in this hearing that they relied on in exercising the State's preemptory challenges.

We urge the Court to conclude that there is no reason to discount the explanations given by the prosecutors at this hearing or at the time they were called upon to give explanations at trial. For that reason, the Defendant has failed to show that the explanations, which were given by the prosecutors, were incorrect or should not be accepted by the Court. The State has gone forward with its burden of producing evidence and the Defendant has failed to sustain his burden of proof on the issue of the **[49]** racial-related reasons. For that reason, we think this Court should find that none of the State's preemptory challenges were exercised for a racially-related motive.

THE COURT: Mr. Cunningham, do you want to reply to that?

MR. CUNNINGHAM: Not at this time, Your Honor. We may at a later date after we review the record and also, hopefully, by the time we have an opportunity to review the facts of this particular hearing—then we may ask the Court to let us present oral argument, but it would be after we get—after we have an opportunity to review the record voir

dire of these ten and also look at the hearing today as the Court is going to do.

MR. KECK: Would the Court prefer to have some sort of proposed findings of fact?

THE COURT: Mr. Cunningham, without prejudging the case, I'm going to find at this point, based on what I've heard today and my recollection of it all, to agree with Mr. Keck's position, but with this qualification: I want the same benefit of everything that you've talked about and that is to review the records myself. I'm going to ask Mr. Keck though, in anticipation of this hearing that we're going to have, to prepare some proposed findings and conclusions so that he can furnish the defense a copy, of course, and I will have those in front of me at the time **[50]** that we have our hearing.

MR. KECK: It may be useful to have Mr. Cunningham prepare findings also and then you will have both of them.

MR. CUNNINGHAM: If you want me to, I will prepare findings establishing a prima facie case. You can then prepare yours where you say there are specific reasons with respect to the ten and we would ask for a few days after his reasons for the ten so maybe we could have some counter findings of facts.

THE COURT: Mr. Keck, can you get your proposed findings in by next Monday? Is that too soon in view of the fact the record we had here today won't be—or is that too soon?

MR. KECK: I need a couple of days after the record is—

THE COURT: Off the record.

(Whereupon, the proceedings in this cause were concluded.)

[51] STATE OF TEXAS
COUNTY OF DALLAS

I, PAMELA SMITH, Official Court Reporter in and for Criminal District Court No. 5 of Dallas County, State of Texas, do hereby certify that the above and foregoing contains a true and correct transcription of all the proceedings directed to be included in the statement of facts in the above styled and numbered cause, all of which occurred in open court or in chambers and were reported by me.

I further certify that this transcription of the record of the proceedings truly and correctly reflects the exhibits, if any, offered by the respective parties.

Witness my hand, this the 16th day of May, A.D., 1988.

/s/ PAM SMITH
PAM SMITH
OFFICIAL COURT REPORTER
Certification No. of Reporter: 112
Date of Expiration of
Current Certification: 12-31-88

CRIMINAL DISTRICT COURT NO. 5
Dallas County Courthouse
600 Commerce
Dallas, Texas 75202
214/749-6696

IN THE CRIMINAL DISTRICT COURT NO. 5
DALLAS COUNTY, TEXAS
NO. 8668-NL

THE STATE OF TEXAS
vs
THOMAS JOE MILLER-EL

FINDINGS OF FACT AND CONCLUSIONS OF LAW UPON REMAND FROM THE COURT OF CRIMINAL APPEALS I.

I
PROCEDURAL HISTORY LEADING TO REMAND

Thomas Joe Miller-El, hereinafter referred to as "Defendant," was charged by indictment with capital murder. Following jury voir dire conducted in February and March of 1986, the Defendant was found guilty of capital murder and sentenced to death. The Defendant appealed his conviction to the Court of Criminal Appeals, raising *inter alia*, a claim that the prosecutors who selected the jury in the instant case violated the principles enunciated in *Batson* v. *Kentucky*, 476 U.S. 79, 106 S.Ct. 1722, 90 L.Ed.2d 69 (1986).

On March 3, 1988, the Court of Criminal Appeals returned an opinion which abated the appeal to this court with instructions to "conduct further proceedings not inconsistent with this opinion and *Batson*" and to forward the record of those proceedings and Findings of Fact and Conclusions of Law to the Court of Criminal Appeals. Opinion of March 3, 1988, 748 S.W.2d 459,461.

The State filed a motion for rehearing which was denied by the Court of Criminal Appeals on April 27, 1988. In the interim, the Court of Criminal Appeals had decided *Keeton* v. *State*, 749 S.W.2d 861 (Tex. Crim. App. 1988) (opinion following abatement).

Accordingly, in its opinion of April 27, 1988, denying the State's motion for rehearing, the Court of Criminal Appeals stated:

> This appeal is abated to the trial court with instructions that it conduct a hearing pursuant to the full procedure and steps outlined in *Keeton* v. *State* ...
>
> Order of 4/27/88.

Because the State's Motion for Rehearing sought to clarify the issue of whether this court could determine whether a prima facie case of purposeful discrimination had been established by the Defendant, this Court deems the use of the phrase "full procedure and steps outlined in *Keeton*' in the order of April 27, 1988 to have added significance[1] and has interpreted the use of this phrase to mean that this Court is to perform all the prongs of the analysis set out in *Keeton*.

II
THE RETROSPECTIVE *BATSON* HEARING

On May 10, 1988, this court conducted a hearing on the *Batson* issues. At that time, the court noted that certain facts were not in dispute or could be stipulated by the parties. S.F. 4-15.[2]

This Court withheld its rulings on the prima facie showing issue and, without objection from either party, asked the to produce its reasons for striking the ten black veniremen. S.F. 15-16.

The State then called Mr. Paul Macaluso, an assistant United States attorney, who, at the time of trial, was the

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[1] It may be that the Court of Criminal Appeals' original opinion ordering a remand to this court also authorized this court to make the prima facie case determination:

> However, it is not for this Court to say whether there was any racial motiation in the prosecutor's actions. Batson requires such a determination being made by he trial court. *Miller-El*, *supra*, at 460.

[2] The court reporter's transcription of this hearing has been typed. It is referred to throughout this set of Findings as: S.F. ____.

Dallas County Assistant District Attorney in charge of the State's voir dire in the instant case. S.F. 17-18; 20-21.

Mr. Macaluso then testified concerning the reasons that the State had exercised peremptory challenges against venireman, No. 102, Paul Bailey. S.F. 21-26. Basically, he testified that he exercised peremptory challenge against Bailey due to the opposition to the death penalty which Bailey had expressed in jury questionnaires and during voir dire. He also testified that race played no part in his decision to strike Bailey.

Mr. Macaluso also testified concerning the State's reasons for striking Venireman Joe Warren. S.F. 26-33. In sum, these reasons included the fact that Warren's brother was a convicted felon, that Warren had given what the State regarded to be inconsistent responses to questions during voir dire regarding the death penalty, and certain answers concerning an incident involving Warren's son. All of these factors led the prosecutors to conclude that Warren would not be a juror favorable to the State. Race played no part in deciding to strike Warren.

The court indicated that it would consider the reasons provided by the State at trial for striking of the other eight black veniremen. S.F. 16; 34; 44-45.

III.

UNDISPUTED FACTS AND LEGAL ISSUES

The following facts, which are relevant to the *Batson* issues before this court, are not disputed:

1) The Defendant is black, and, therefore, he is a member of a "cognizable racial group" for purposes of *Batson*.
2) That jury voir dire occurred in February and March of 1986, well before the return of the Supreme Court's opinion in Batson.
3) That during the course of the individual voir dire process, the State exercised 14 of its 15 peremptory challenges.

4) That the State exercised 10 of these 14 peremptory challenges against veniremen of the Defendant's race.
5) That six other black veniremen were excused by the agreement of the parties.
6) That the jury selected and impaneled had nine white jurors, one Hispanic juror, one black juror, and one Filipino juror.

IV.

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON DISPUTED ISSUES

A. Prima Facie Case

At the time of the trial in this case, this court was convinced that none of the State's peremptory challenges were made for race-related reasons. The court remains convinced that this is true, and holds that the evidence did not even raise an inference of racial motivation in the use of the state's peremptory challenges. While it is true that the State used 10 of its 14 peremptory challenges against black veniremen, it is also true that one black venireman did serve on the jury. However, such raw numbers, while instructive, are not the sole basis for this court's holding; rather, the court has considered the entire voir dire process, including the undisputed facts set forth in Part III, supra, and the explanations for the exercise of the State's peremptory challenges offered at trial and at the retrospective Batson hearing. In this regard, this Court has considered the procedure outlined by the Supreme Court of Missouri in *State* v. *Antwine*, 743 S.W.2d 51 (Mo. banc 1987), an opinion quoted extensively by the Court of Criminal Appeals in its opinion in *Keeton* v. *State*, supra. *See*, 749 S.W.2d at 865-66. In Antwine, the Court stated:

> As a practical matter, the third element of the prima facie case under Batson—"facts and any other relevant circumstances raise an inference that the prosecutor used (his peremptory challenges) to exclude the veniremen from the petit

> jury on account of their race"—requires the trial court to consider the State's explanation of the manner in which it employed its challenges prior to making a final determination as to whether a prima facie case exists. We must therefore direct our trial judges to consider the prosecutor's explanations as part of the process of determining whether a defendant has established a prima facie case of racially discriminatory use of peremptory challenges.
>
> *Antwine*, 743 S.W.2d at 64.

B. Reasonableness of the State's Explanations

Because this court does not wish to unduly delay the progress of the appeal of this case, it required the State to produce explanations for the exercise of all of her peremptory challenges, notwithstanding the court's belief in the correctness of its ruling on the prima facie showing issue. The Court has considered the reasons given at trial and those offered at the hearing on remand. As to the ten black veniremen in question, the Court makes the following Findings of Fact and Conclusions of Law:

1. The Court finds that the prosecutor came forward with a neutral explanation for each of the State's peremptory challenges of a venireman of the Defendant's race.
2. The Court finds that the explanations given by the prosecutor in each case were completely credible.
3. The Court finds that explanations given by the prosecutor as to each venireman were completely sufficient as to content.
4. The Court finds that none of the explanations given by the prosecutor were based on a group trait which was not shown to apply to the challenged veniremen specifically.
5. The Court finds that none of the veniremen in question were examined only perfunctorily by the prosecutors.

6. The Court finds that no disparate prosecutorial examination of any of the veniremen in question has been shown.
7. The Court finds that the primary reasons for the exercise of the challenges against each of the veniremen in question, their reluctance to assess or reservations concerning the imposition of the death penalty, were closely and directly related to the facts of the case, insofar as this was a death penalty case.
8. The Court finds the other factors cited by the prosecutors were reasonably related to the facts of the case.
9. The Court finds that there has been no showing by the Defendant of disparate treatment by the prosecutor of the black veniremen in question versus non-black veniremen, where there was a difference between the responses given by veniremen who were and who were not challenged by the State.
10. The Court finds that there was no purposeful discrimination by the prosecutor in the use of his peremptory strikes.

SIGNED THIS 13 day of January 1989.

/s/ Pat McDowell

PAT McDowell, Judge
Criminal District Court No. 5
Dallas County, Texas

NO. 69,677

THE STATE OF TEXAS,

Appellee,

v.

THOMAS JOE MILLER-EL,

Appellant.

Appeal from the Criminal District Court No. 5
[DALLAS County]

OPINION

Appellant was convicted of Capital Murder for shooting to death an Irving motel clerk during the course of committing Robbery. *See* V.T.C.A., Penal Code, Section 19.03 (a)(2). The historical facts of this case are reported at *Miller-El* v. *State*, 782 S.W.2d 892, 893-894 (Tex.Cr.App. 1990). Punishment was assessed at death. *See* Art. 37.071 (b), V.A.C.C.P. Appeal to this Court is automatic. *See* Art. 37.071(h), V.A.C.C.P.; Tex.R.App. Proc. 40 (b) (1).

I.

In his first seven points of error appellant makes various complaints related to the allegedly intentional exclusion of black veniremembers from jury service by the prosecuting attorneys in this case. *See Swain* v. *Alabama*, 380 U.S. 202 (1965); *Strauder* v. *West Virginia*, 100 U.S. 303 (1880). To the extent that these points implicate a claimed Sixth Amendment right to a petit jury reflecting a fair cross-section of appellant's community, we note only that such right has not been recognized by the Supreme Court, nor is its recognition by that Court anticipated by this one. *Holland* v. *Illinois*, 493 U.S. 474 (1990); *Seubert* v. *State*, 787 S.W.2d 68 (Tex.Cr.App. 1990).

Nevertheless, the original appellate record in this cause does disclose that appellant is himself an African-American and that a sufficiently disproportionate number of black veniremembers were removed by peremptory challenge of the State as to make a *prima facie* case of racial discrimination in the jury selection process, contrary to the Fourteenth Amendment. Because *Batson* v. *Kentucky*, 476 U.S. 79 (1986), was not decided until after trial of this cause, we abated the appeal and remanded for an evidentiary hearing in the trial court on the ultimate question of intentional discrimination. *Miller-El* v. *State*, 748 S.W.2d 459 (Tex.Cr.App. 1988). *See Griffith* v. *Kentucky*, 479 U.S. 314 (1987). We have received the supplemental transcript and statement of facts from this hearing, including the trial judge's findings of fact and conclusions of law. Based upon our independent evaluation of the supplemented record, we are of the opinion that no error is shown.

With respect to each black veniremember against whom the State exercised a peremptory challenge, a racially neutral explanation, reasonably related to the trial of this case, was offered by prosecution witnesses. *See* Appendix A. Thus, it became appellant's burden to prove by a preponderance of the evidence that such explanations were untrue in fact and that one or more African-American veniremembers were indeed struck by the State on account of their race. *Tompkins* v. *State*, 774 S.W.2d 195, 201-202 (Tex.Cr.App. 1987).

We have carefully reviewed the *voir dire* examination of these prospective jurors and find ample support there for the prosecutor's racially neutral explanations. *See Young* v. *State*, 826 S.W.2d 141 (Tex.Cr.App. 1992). Accordingly, we do not believe that such explanations are patently implausible or so contrary to the evidence as to be unworthy of belief as a matter of law. CF. *Whitsey* v. *State*, 796 S.W.2d 707, 720 (Tex.Cr.App. 1989) (opinion on rehearing). Accordingly, we do not find the trial judge's conclusion that no black veniremembers were intentionally excluded on account of their race to be clearly erroneous.

Appellant's first seven points of error are overruled.

II.

Appellant next complains that ten prospective jurors should have been excluded for cause on his motion, mainly because their attitudes about punishment were so harsh that they could not realistically consider the minimum penalty for murder or give fair effect to the presumption of innocence. *See, e.g., Faulder* v. *State*, 745 S.W.2d 327, 339 (Tex.Cr.App. 1987), and *Homan* v. *State*, 662 S.W.2d 372 (Tex.Cr.App. 1984), *respectively*.

The fact that a veniremember holds strictly retributive values or advocates severe punishment for criminal offenders does not disqualify him from jury service in this state. Just as those opposed to capital punishment or inclined to leniency in general are legally qualified jurors, so also are those holding an opposite system of values. Neither kind of person is challengeable for cause unless he harbors a bias or prejudice against the law which is likely to prevent or substantially impair performance of his duties as a juror.

One who regards with disfavor the minimum penalty for a criminal offense is not necessarily suffering an objectionable impairment. *See Williams* v. *State*, 773 S.W.2d 525, 535-537 (Tex. Cr. App. 1988). So long as he is able to give the entire legal range of punishment due consideration, he is a fully capable juror under the laws of Texas. *Cordova v. State*, 733 S.W.2d 175, 164-185 (Tex.Cr.App. 1987). Likewise, those who express the accurate belief that indictees are officially suspected of wrongdoing do not thereby possess a fatal bias against the presumption of innocence unless they are also unwilling to base their conclusions about culpability entirely upon the evidence actually adduced in their presence at trial. *See Mays* v. *State*, 726 S.W.2d 937, 951 (Tex.Cr.App. 1986); *Bell* v. *State*, 724 S.W.2d 780, 797 (Tex.Cr.App. 1986).

We have carefully examined the complete *voir dire* examination of each veniremember whom appellant claims was challengeable for cause, whether for prejudice against the full range of punishment or bias against the presumption of

innocence. As to each respective claim, we find credible assertions of willingness to obey instructions of the court with respect to all matters of law affecting jury deliberations and to consider the full range of punishment applicable to every potential offense in the case. *See Appendix B.* Consequently, appellant has not persuaded us that the trial judge erred by rejecting his challenge to any specified veniremember.

Points of error eight through sixteen, inclusive, are overruled.

III.

In his seventeenth point of error appellant claims that the trial judge erred in refusing to allow him additional peremptory challenges during the jury selection process.

By law, each side in a capital murder prosecution wherein the death penalty is a possible punishment is allowed to decline, without specific legal cause, the service of fifteen prospective jurors. Art. 35.15 (a), V.A.C.C.P. The law does not authorize more peremptory challenges than this except for the selection of alternate jurors. Art. 35.15 (d), V.A.C.C.P. The only other instance in which an additional challenge should be dispensed by the trial judge is where he has erroneously denied an earlier challenge for cause and the aggrieved party was thereby forced to use a peremptory strike against an objectionable juror. *Demouchette* v. *State*, 731 S.W.2d 75, 83 (Tex.Cr.App. 1986); *Thomas* v. *State*, 701 S.W.2d 653, 658 (Tex.Cr.App. 1985). In such case, however, the additional challenge merely restores a full complement of strikes to the offended party.

Because appellant did not demonstrate in Part II, *ante*, that he was forced to expend peremptory challenges against veniremembers who should have been removed for cause at his request, failure to allow him more peremptory challenges was not improper. *Barney* v. *State*, 698 S.W.2d 114, 124 (Tex.Cr.App. 1985); *Von Byrd* v. *State*, 569 S.W.2d 883, 892-893 (Tex.Cr.App. 1978).

Appellant's seventeenth point of error is overruled.

IV.

Points of error eighteen and nineteen pertain to two witnesses called by the defense who refused to testify at trial upon the ground that their testimony might incriminate them. Appellant sought "transactional immunity" for both, and here complains that the trial judge erroneously denied it. Arguing that the State is generally entitled to such immunity for prosecution witnesses under V.T.C.A., Penal Code, Section 71.04, appellant insists that ordinary principles of fairness secure him a like consideration.

But the statute to which he refers applies by its terms only to "an offense under this chapter[,]" meaning an offense under Chapter 71 of the Penal Code. Since appellant was not charged with such an offense in the instant prosecution, it does not appear that Section 71.04 is in control of his demand for witness immunity. In any case, neither the statute, the constitutional right of compulsory process, nor the vital decisional law of this State assures an accused equal license to compel a grant of immunity for purposes of obtaining testimony otherwise subject to the privilege against self-incrimination. *Autry* v. *Estelle*, 706 F.2d 1394, 14001403 (5th Cir. 1983); *United States* v. *Chagra*, 669 F.2d 241, 258261 (5th Cir. 1982); *Moorhouse* v. *State*, 614 S.W.2d 450, 453 n. 3 (Tex.Cr.App. 1981) (Clinton, J., concurring); *Ross* v. *State*, 486 S.W.2d 327, 328-329 (Tex.Cr.App. 1972). *But see Norman* v. *State*, 588 S.W.2d 340, 343-345 (Tex.Cr.App. 1979). Witnesses who possess the privilege are themselves only entitled to testimonial or use immunity under such circumstances. *Kastigar* v. *United States*, 406 U.S. 441 (1972); *Ex parte Wilkinson*, 641 S.W.2d 927, 929-930 (Tex.Cr.App. 1982); *Ex parte Shorthouse*, 640 S.W.2d 924 (Tex.Cr.App. 1982). Accordingly, appellant's demand of transactional immunity for his witnesses need not have been granted by the trial judge.

Points of error eighteen and nineteen are overruled.

V.

Appellant's wife, a coindictee, also invoked her privilege not to testify at trial. However, appellant claims that she

waived the privilege by testifying outside the jury's presence as to her name, age, marital status, and whereabouts on a date pertinent to the instant prosecution. The trial judge agreed and held her in contempt for refusing to testify before the jury, but denied appellant's request to read a transcription of her earlier testimony to the jury instead. Because this transcription would have included statements made to the trial judge tending to create an alibi for appellant, he maintains it was error to exclude the evidence.

We need not decide whether appellant's wife indeed waived her privilege not to testify, as the transcription of her earlier statements was never actually offered in evidence by appellant. *But see Grayson* v. *State*, 684 S.W.2d 691 (Tex.Cr.App. 1984). Although the State shared appellant's view at trial that her privilege had been waived, it evidently did not agree that her remarks to the trial judge should be read to the jury, since no objection was interposed by the prosecutor when the judge denied appellant's motion to do so. It thus seems that the trial judge anticipated an objection from the State and prospectively sustained it.

Ordinarily, we would be disinclined to condone such behavior. Parties are bound to make their own objections, and trial judges are usually expected to receive evidence against which no objection has been interposed. In this instance, however, appellant didn't attempt to offer his evidence in the usual way, as by calling a witness to his wife's declarations. As a consequence, counsel for the State wasn't afforded a fair opportunity to register his own objections, if any. Instead, appellant solicited prospective permission of the trial judge to have his wife's statements read to the jury by the court reporter. But because this testimony was not elicited in the jury's presence to begin with, reading it back before receiving it into evidence would have been improper. In short, appellant was obliged first to offer the evidence before complaining of its exclusion. Likewise, the State was not obliged to interpose an objection to evidence not actually tendered before the tier [sic] of fact. Under the present circumstances, therefore, we think it inappropriate to find er-

ror in the court's ruling. Appellant's twentieth point of error is overruled.

VI.

In four points of error, appellant complains of the receipt into evidence of twenty-three color photographs depicting from various angles and at various distances the murder scene and body of the deceased. He claims that these photographs were offered "solely to inflame the minds of the jury." *Martin* v. *State*, 475 S.W.2d 265, 267 (Tex.Cr.App. 1972). We have since recognized, however, that the admissibility of photographs with inflammatory potential is controlled by Texas Rule of Criminal Evidence 403, and have declared Martin defunct to the extent of any conflict. *Long* v. *State*, 823 S.W.2d 259, 271-272 (Tex.Cr.App. 1991). Still, the result in this case would be the same under either formulation.

We have examined the exhibits in question, and they do not impress us as unusually shocking or gruesome. Because appellant doesn't dispute their relevancy, we are unconvinced that the prejudice inherent in a visual representation of this dreadful crime necessarily outweighs as a matter of law its acknowledged probative value. Tex.R.Crim.E. 403; *Rogers* v. *State*, 774 S.W.2d 247, 258 (Tex.Cr.App. 1989); *Williams* v. *State*, 773 S.W.2d 525, 539 (Tex.Cr.App. 1988). Accordingly, the trial judge was within the ambit of his discretion to admit the photographs.

Appellant's points of error twenty-one through twenty-four, inclusive, are overruled.

VII.

Points twenty-five through thirty-four declare that appellant's arrest and the subsequent search of his automobile were unlawful, that the ordnance seized as a result should have been suppressed, and that color photographs of the car, the weapons, and the scene were likewise inadmissible. *See* U.S. Const., Amend. 4; Tex.Const. Art. 1, Sec. 9.

When investigation of the murder in this case cast suspicion on appellant, a warrant was issued for his arrest and

for a search of his Irving residence. It was then discovered that he had gone to Houston and was residing with an acquaintance there. Accordingly, Dallas authorities advised Harris County by teletype that appellant was wanted on a murder warrant in Irving.

Based on this information, agents of the Houston Police Department (HPD) and of the United States Bureau of Alcohol, Tobacco, and Firearms sought a search warrant for the residence of appellant's Houston acquaintance, including another warrant for appellant's arrest. While the site was surrounded, appellant and his friend arrived in a white Cadillac Seville. After depositing his companion and the latter's young children at the house, appellant noticed approaching law enforcement officers. Evidently in an attempt to escape, he backed from the driveway and spun the car quickly around, but his egress was blocked by a police vehicle. Brandishing a pistol, he sprang from the car, was shot by an HPD marksman and then arrested.

Appellant insists that his arrest was in fact made under authority of the Harris County warrant, which was invalid because issued only after he was actually taken into custody. But we need not pass upon validity of the Harris County warrant as Houston police officers were authorized to arrest appellant pursuant to the Dallas warrant of which they had been informed. The legality of their conduct in reliance on this warrant did not depend, as appellant mistakenly contends, upon their actual possession of the document. Art. 15.26, V.A.C.C.P.; *Bradley* v. *State*, 478 S.W.2d 527, 530 (Tex.Cr.App. 1972); *Cook* v. *State*, 470 S.W.2d 898, 899 (Tex.Cr.App. 1971). Rather, they were fully empowered to arrest him on notice of the outstanding warrant received electronically from Dallas law enforcement authorities. *Cf.* Art. 15.08, V.A.C.C.P. Any weapons and ammunition taken at that time from his person or from places in the immediate vicinity were, of course, seized pursuant to a lawful arrest and not subject to suppression on the grounds he now urges. *New York* v. *Belton*, 453 U.S. 454 (1981).

As for items obtained from within the Cadillac, especially weapons found in the trunk, the record reflects that the car was owned by appellant's companion, who voluntarily consented to its search by law enforcement officers. *See United States* v. *Matlock*, 415 U.S. 164 (1974); *Sharp* v. *State*, 707 S.W.2d 611, 617 (Tex.Cr.App. 1986); *Williams* v. *State*, 621 S.W.2d 609, 613 (Tex. Cr.App. 1981) (panel opinion). *Cf. Bumper* v. *North Carolina*, 391 U.S. 543 (1968).

Points of error twenty-five through thirty-four, inclusive, are overruled.

VIII.

Next, appellant maintains that the court's charge to the jury erroneously failed to restrict consideration of extraneous offenses to the limited purpose for which they were proven.

When evidence is received for a limited purpose the jury should, of course, be instructed as to the limitation, at least upon timely request of an affected party. Tex.R.Crim.E. 105 (a). Most often such limitation is sought because the evidence is relevant, not only to the issue for which it was received, but also to some other issue upon which it was not admissible and concerning which it might therefore be unfairly prejudicial. *See* Tex.R.Crim.E. 403. Proof of an extraneous offense is almost invariably admissible at the guilt/ innocence phase of trial only insofar as it illuminates a material issue in the case, *E.g.*, *Crank* v. *State*, 761 S.W.2d 328, 340-345 (Tex.Cr.App. 1988). It is never admissible merely to encourage the inference that an accused is likely to be guilty solely because he committed other crimes in the past. Tex.R.Crim.E. 404 (b). *E.g.*, *Williams* v. *State*, 662 S.W.2d 344 (Tex.Cr.App. 1983).

In the instant cause the trial judge overruled appellant's objection to the admission of extraneous offenses without requiring the State to indicate the purpose for which it offered the evidence. Whether the judge erred in this respect, either by overruling appellant's objection or by failing to specify the limited purpose for which the evidence was received, is not a question upon which appellant has sought

review in this Court. Rather, he complains only that the court's charge on extraneous offenses failed to limit the jury's consideration of such evidence to the purpose for which it was received.

Since it appears from the record that such evidence was in fact received, whether rightly or wrongly, for general purposes, the jury was thus entitled to consider it upon any issue to which it was relevant, without limitation. Tex.R.Crim.E. 105 (a); *Richardson* v. *State*, 786 S.W.2d 335, 337-338 (Tex.Cr.App. 1990); *Cantrell* v. *State*, 731 S.W.2d 84, 94-95 (Tex.Cr.App. 1987). Accordingly, the trial judge did not err in overruling appellant's objection.

Point of error thirty-five is overruled.

IX.

Finally, appellant asserts that four prospective jurors were excluded for cause on motion of the State because of their opposition to capital punishment, in violation of the United States Constitution. *Wainwright* v. *Witt*, 469 U.S. 412 (1985); *Adrams* v. *Texas*, 448 U.S. 38 (1980); *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968). An examination of the record discloses that, while not all of these veniremembers were opposed to the death penalty in principle, all were opposed for reasons of conscience or religion to serving as jurors in a case where the death penalty might be assessed.

We have held that capital veniremembers, even if willing and able honestly to answer the special punishment issues, may be challenged for cause if they would opt to refuse the oath of a juror and thereby disqualify themselves from jury service on account of personal aversion to assessing the death penalty. *Goodwin* v. *State*, 799 S.W.2d 719, 733-734 (Tex.Cr.App. 1990); *Ellis* v. *State*, 726 S.W.2d 39, 41-44 (Tex.Cr.App. 1986). *Cf. Felder* v. *State*, 758 S.W.2d 760, 765-766 (Tex.Cr.App. 1988). *Contra Hernandez* , 757 S.W.2d at 753. The record in this cause rather clearly reflects that each of the prospective jurors whose exclusion is at issue here chose to exercise that option.

Appellant's thirty-sixth point of error is, therefore, overruled.

Finding no reversible error in the complaints assigned for review, we affirm appellant's conviction and sentence of death.

PER CURIAM

EN BANC

DELIVERED: September 16, 1992

DO NOT PUBLISH

Overstreet, J., concurs in the result Clinton, J., dissents

Baird and Maloney, JJ, not participating

APPENDIX A

POINTS OF ERROR ONE THROUGH SEVEN:

Boseman: Venireman #7

State's justification for peremptory strike included the venireman's testimony regarding the death penalty and his possible hesitation in giving such a sentence. Support is found in the record where Boseman testified he agreed with the death penalty but could not serve on a capital murder jury (Voir Dire Vol. I-282). Also, he testified that if he felt that the defendant should not be executed, he could not answer the three punishment issues yes even though the evidence supported affirmative answers (Voir Dire Vol. I-300 through 301).

Fields: Venireman #9

State's justification for peremptory strike included the venireman's testimony regarding rehabilitation, religious beliefs, and the fact his brother had been convicted of a felony. Support is found in the record where Fields testified that the death penalty was only appropriate when a person could not be rehabilitated and it was his belief that anyone could be rehabilitated who found God (Voir Dire Vol. I-423). Also, Fields testified his religion's doctrinal views opposed the death penalty though this was not his personal opinion (Voir Dire Vol. I-404 through 405).

Warren: Venireman #28

Justification for the peremptory strike included Warren's misgivings about the death penalty (Supp. Hearing Vol. I-29 through 31). The record indicates that Warren had mixed feelings about the death penalty serving a purpose (Voir Dire Vol. III-1532). In addition, he did not agree with the death penalty in all cases (Voir Dire Vol. III-1526). The state also noted that the strike of Mr. Warren came at a time when they had numerous peremptory strikes remaining and could utilize them with less caution.

Rand: Venireman #37

State's justification for peremptory strike included Rand's "today I say I can, but tomorrow I might not" (Voir Dire Vol. IV-2008).

Boggess: Venireman #40

State's justification for peremptory strike includes Boggess' reluctance to sit on a capital murder jury (reflected in record at Voir Dire Vol. IV-2008) as well as the fact she had been a defense witness for her nephew at one time.

Kennedy: Venireman 43

State's justification for peremptory strike included Kennedy's belief that in a capital murder case involving a normal robbery, the death penalty was inappropriate and that it is only appropriate in mass murder situations (Voir Dire Vol. 2176 through 2178).

Baker: Venireman 71

State's justification for peremptory strike involved Baker's dislike for the death penalty and her inability to sentence another human to death (Voir Dire Vol. VIII-2990 through 2991). The State also noted that her antagonistic attitude towards the prosecuting attorney was a factor.

APPENDIX B

POINTS OF ERROR EIGHT THROUGH SIXTEEN:

Weigant: Venireman #6

Defense objected to Weigant's views regarding the death penalty. Weigant testified that his personal view was the death penalty should be used for any intentional murder. However, he specifically stated he would follow the law and would not impose his personal view upon the defendant (Voir Dire Vol. I-204 through 205). Defense also questioned whether he was capable of assessing the minimum punishment for murder. In this regard, he specifically stated he would vote for the five year minimum if the facts of the case warranted it (Voir Dire Vol. I-247 through 249).

Jenkins: Venireman 21

Defense objected to Jenkins' inability to assess the minimum penalty in a murder case. However, Jenkins specifically stated that if the evidence proved that the minimum sentence was warranted, she would give that sentence (Voir Dire Vol. III-1126).

Smale: Venireman #24

Defense objected due to Smale's inability to give the minimum sentence for murder as well as her view that she would be unable to answer any of the three punishment related questions in the negative if the defendant were found guilty of capital murder. However, during questioning by the court, she specifically stated that she would assess the minimum penalty for murder if the evidence showed that it was appropriate (Voir Dire Vol. III-1324 through 2326). She also specifically stated that she could answer one or more of the punishment questions in the negative based upon the evidence and they were not automatic "yes" votes (Voir Dire Vol. III-1336 through 1337).

Nix: Venireman #48

Defense objected due to Nix's inability to consider the minimum punishment for murder. However, she specifically stated that she would assess punishment at five years if she

thought that it was appropriate based upon the evidence presented (Voir Dire Vol. V-2396).

Walters: Venireman X79

Defense objected due to Walters' belief that she would automatically answer yes to all three punishment questions if the defendant was found guilty of capital murder. However, under questioning from the court, Walters testified that the state would have to prove that the answers to the questions were yes; if they were not proven, then she would answer in the negative (Voir Dire Vol. VIII-3393 through 3394).

Davis: Venireman #82

Defense objected to Davis' inability to assess the minimum punishment for murder. However, Davis did specifically say she could vote for the minimum penalty of five years if the evidence warranted such a sentence though she had trouble imagining such a situation (Voir Dire Vol. IX-3496 through 3497).

Spence: Venireman #85

Defense objected to Spence because he presumed the defendant had done something wrong by virtue of his being tried for capital murder. In this regard, Spence testified that an indictment did not satisfy him beyond a reasonable doubt and that he would not consider the indictment as evidence against the defendant (Voir Dire Vol IX-3567 through 3570). Defense also questioned Spence's ability to assess the minimum penalty for murder. Spence, however, specifically stated he would keep an open mind about punishment and would assess the minimum punishment if warranted (Voir Dire Vol. IX-3534 through 3535).

Jones: Venireman #103

Defense objected to Jones' inability to consider the minimum punishment for murder. Jones did testify that he believed the punishment for any murder should be mandatory death and that this would make it easier for him to assess the maximum rather than the minimum penalty. However, he specifically stated he would put these personal

views behind him and would consider the minimum penalty if the evidence supported it. (Voir Dire Vol. XI-4217 through 4220).

O'Dell: Venireman #107

Defense objected to O'Dell due to his inability to consider the minimum penalty for murder. However, he specifically stated he could consider a punishment of five years for murder in the proper case and proper circumstances (Voir Dire Vol. XI-4511 through 4512).

Hearne: Venireman #108

Defense objected *to* Hearne's bias towards police officers, her bias against psychiatrists, and her testimony that she would change her opinion of guilt or innocence if she were the only dissenting vote on the jury. However, she testified she would not give more credibility to a police officer than any other witness (Voir Dire Vol. XI-4622). She also testified her objection to psychiatrists was only in her belief that there were certain things which could not be proven. She specifically stated she would believe a psychiatrist was telling the truth to the best of his ability (Voir Dire Vol. XI-4627 through 4628). Finally, when questioned by the court, Hearne testified she would change her opinion only if convinced by the other jurors that her initial position was incorrect (Voir Dire Vol. XI-4636).

* * * *

No. 69,677

THOMAS JOE MILLER-EL,

Appellant,

vs.

THE STATE OF TEXAS,

Appellee.

APPEAL FROM DALLAS COUNTY

AFFIRMED.

OPINION BY
PER CURIAM

Judge

EN BANC
DO NOT PUBLISH
Overstreet, J., concurs in the result
Clinton, J., dissents
Baird and Maloney JJ, not participating

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

No. 3-96-cv-1992-H

THOMAS JOE MILLER-EL

Petitioner,

vs.

GARY JOHNSON, Director Texas Department of Criminal Justice, Institutional Division

Respondent.

FINDINGS AND RECOMMENDATION OF THE UNTIED STATES MAGISTRATE JUDGE

This case has been referred to the United States magistrate judge pursuant to 28 U.S.C. § 636(b) and an order of reference from the district court. The findings and recommendation of the magistrate judge are as follow:

I.

PROCEDURAL BACKGROUND

Petitioner Thomas Joe Miller-El was convicted of capital murder and sentenced to death. His conviction and sentence were affirmed on direct appeal. *Miller-El* v. *State*, No. 69,677 (Tex. Crim. App. September 16, 1992), *cert. denied*, 114 S. Ct. 100 (1993). Petitioner also filed an application for writ of habeas corpus in state court. The trial judge made written findings and recommended that the application be denied. The Texas Court of Criminal Appeals denied habeas relief in an unpublished opinion. *Ex parte Miller-El*, No. 31,001 (Tex. Crim. App. June 17, 1996). Petitioner then filed this action in federal court.

II

ISSUES PRESENTED

Petitioner raises four issues in six grounds for relief. He contends that: (1) the prosecution exercised its peremptory challenges in a racially discriminatory manner; (2) a prospective juror was improperly struck for cause; (3) the trial court failed to conduct a competency hearing and allowed the trial to proceed despite the fact that he was incompetent; and (4) the prosecutor improperly referred to his religious affiliation during sentencing.

III.

STANDARD OF REVIEW

The standard of review in federal habeas proceedings is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT, Pub.L. No. 104-132, 110 Stat. 1214 (1996). The AEDPA establishes specific standards and procedures for reviewing death penalty habeas cases. *See* 28 U.S.C. §§ 2661-2266. These rules apply to all capital cases pending on or after the effective date of the AEDPA, provided the state has established a mechanism for the "appointment, compensation, and payment of reasonable litigation expenses of competent counsel in state post-conviction proceedings." *Id.* § 2261(a), (b) & (c). Texas does not yet meet these "opt-in" requirements. *Carter* v. *Johnson*, 110 F.3d 1098, 1104 (5th Cir.), *vacated on other grounds*, 118 S.Ct. 409 (1997). Therefore, the Court must look to the general standards of review under the AEDPA.

A federal court may not grant habeas relief with respect to any claim that was adjudicated on the merits in a state court proceeding unless petitioner shows that the prior adjudication: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court. 28 U.S.C. § 2254(d). A state court decision is not "contrary to clearly established

federal law" unless a different result was dictated by existing Supreme Court precedent. *Drinkard* v. *Johnson*, 97 F.3d 751, 768 (5th Cir. 1996), *cert. denied*, 117 S.Ct. 1114 (1997). A state fact finding is not "unreasonable" unless the petitioner can rebut the finding by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). An application of law to facts is not "unreasonable" unless "[the] state court decision is so clearly incorrect that it would not be debatable among reasonable jurists." *Drinkard*, 97 F.3d at 769.[1]

[1] Petitioner argues that *Drinkard* misinterpreted the standard of review for federal habeas cases under 28 U.S.C. § 2254(d)(1). The *Drinkand* court held that the first clause of the statute-prohibiting habeas relief unless the state court adjudication resulted in a decision that was "contrary to" clearly established federal law—applies only to questions of pure law. Under this interpretation, a federal court cannot grant habeas relief unless the state court failed to identify the correct rule of law when it adjudicated the claim. *Drinkard*, 97 F.3d at 767-68. Petitioner advocates a different interpretation of the "contrary to" clause. He suggests that the proper inquiry should be whether the Supreme Court had announced a controlling rule of law prior to the time the claim was adjudicated in state court. If so, a federal habeas court must decide whether the state court decision is "contrary to" that established law. Otherwise, the "unreasonable application" clause of the statute comes into play and the federal court must determine whether the state court adjudication was untenable under existing Supreme Court authority. (Pet. Reply at 13-17).

In sum, petitioner maintains that there is no basis for the distinction in the standard of review for "pure legal questions" and "mixed questions of law and fact" under the AEDPA. Both should be subject to review under the "unreasonable application" clause of section 2254(d)(1) where there is no Supreme Court authority directly on point. *(Id.). See Drinkard*, 97 F.3d at 778-79 (E. Garza, J., dissenting). Moreover, petitioner contends that the court's interpretation of the "unreasonable application" clause—making habeas relief available "only if a state court decision is so clearly incorrect that it would not be debatable among reasonable jurists"—raises serious problems under Article III and the Suspension Clause of the U.S. Constitution. (Pet. Reply at 20). These are thoughtful and provocative arguments. Nevertheless, this Court is bound by the *Drinkard* majority and must follow its holding. *See Cedillo* v. *Valcar Enterprises & Darling Delaware Co.*, 773 F.Supp. 932, 936 (N.D. Tex. 1991) (district court is bound by Fifth Circuit precedent).

IV.

PEREMPTORY CHALLENGES

(Grounds 1 & 2)

In two related grounds for relief, petitioner argues that the prosecution used 10 of its 14 peremptory challenges to exclude African-Americans from jury service in violation of the equal protection clause of the Fourteenth Amendment.

A. *Applicable Law*

The Fourteenth Amendment guarantees every defendant in a criminal case equal protection under the law. *Hernandez.* v. *State*, 347 U.S. 475, 477, 74 S.Ct. 667, 670, 98 L.Ed. 866 (1954). This right extends to the jury selection process. *Swain* v. *Alabama*, 380 U.S. 202, 204, 85 S .Ct. 824, 826,13 L.Ed.2d 759 (1965); *Strauder* v. *West Virginia*, 10 Otto 303,100 U.S. 303, 305-08, 25 L.Ed. 664 (1879). Thus, a prosecutor may not use his allotted peremptory challenges to exclude potential jurors solely on the basis of their race. *Swain*, 85 S.Ct. at 837-38. Prior to the *Batson* decision in 1986, the use of peremptory strikes against minorities in any single case was not unconstitutional. *Id.* at 836-37. Rather, a defendant was required to demonstrate a historical pattern of racial bias in the selection of juries. *Id.* at 837-38. The Fifth Circuit explained this burden as follows:

> In order to prevail [on a *Swain* claim], [petitioner] must prove that his prosecutor "had a systematic and *intentional* practic of excluding blacks from traverse juries in criminal trials through the exercise of peremptory challenges, and that this practice continued unabated through petitioner's trial."

Evans v. *Cabana*, 821 F.2d 1065, 1068 (5th Cir.), *cert. denied*, 108 S.Ct. 5 (1987), quoting *Willis* v. *Zant*, 720 F.2d 1212, 1220 (11th Cir. 1983), *cert. denied*, 104 S.Ct. 3548 (1984) (emphasis in original). Absent evidence of purposeful and systematic discrimination, the prosecutor was entitled to a presumption that he used his peremptory stakes in a proper manner. *Swain*, 85 S.Ct. at 837.

The Supreme Court revisited this issue twenty years later in *Batson* v. *Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Recognizing that it was often impossible for a defendant to prove the systematic exclusion of minorities from jury service over an extended period of time, the Court rejected this evidentiary formulation "as inconsistent with standards that have been developed since *Swain* for assessing a prima facie case under the Equal Protection Clause." *Id.*, 106 S.Ct. at 1721.[2] No longer were defendants required to establish a historical pattern of discrimination in the use of peremptory stakes. *Batson* held that "a defendant may make a prima facie showing of purposeful racial discrimination in selection of the venire by relying solely on the facts concerning its selection in his case." *Id.* at 1722 (emphasis in original).

A proper *Batson* challenge has three elements. First, the defendant must raise an inference that the prosecutor excluded potential jurors solely on the basis of race. *Id.* at 1723; *United States* v. *Wallace*, 32 F.3d 921, 925 (5th Cir.1994). A defendant may satisfy this burden in a variety of ways, such as showing a pattern of strikes against minority jurors on the venire panel or statements made by the prosecutor during the voir dire examination. *Batson*, 106 S.Ct. at 1723. Once the defendant makes a *prima facie* case, the burden shifts to the prosecution to articulate a race-neutral explanation for each of the challenged strikes. *Id.* at 1723-24; *Wallace*, 32 F.3d at 925. This inquiry focuses on the facial validity of the proffered explanation. "Unless discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race-neutral."

[2] The Supreme Court observed that the "crippling burden" imposed by Swain rendered the prosecution's use of peremptory challenges "largely immune from constitutional scrutiny." *Batson*, 106 S.Ct. at 1721. Indeed, this Court has found only two reported cases in which *Swain* relief was granted. *See State* v. *Washington*, 375 So.2d 1162 (La. 1979); *State* v. *Brown*, 371 So.2d 751(La. 1979). Both cases involved the same prosecutor who essentially admitted that he systematically struck African-Americans from jury service. *Washington*, 375 So.2d at 1163-64.

Purkett v. *Elem*, 514 U.S. 765, 768, 115 S.Ct. 1769, 1771, 131 L.Ed.2d 834 (1995) (citations omitted); see also United States . Perkins, 105 F.3d 976, 978 (5th Cir. 1997). The trial court then determines whether the defendant has proven purposeful discrimination. *Batson*, 106 S.Ct. at 1724; *Wallace*, 32 F.3d at 925.

When the record contains an explanation for the prosecutor's use of peremptory challenges, the reviewing court need only decide the propriety of the ultimate finding of discrimination. *Perkins*, 105 F.3d at 978; *United States* v. *Forbes*, 816 F.2d 1006, 1010 (5th Cir. 1987). This finding is entitled to great deference because it largely turns on an evaluation of the credibility or demeanor of the attorney who exercises the challenge. *Hernandez* v. *New York*, 500 U.S. 352, 363, 111 S.Ct.1859,1869,114 L.Ed.2d 395 (1991); *United States* v. *Bentley-Smith*, 2 F.3d 1368, 1373 (5th Cir. 1993). In a federal habeas case, such a finding will not be disturbed "unless it constitutes an unreasonable determination of the facts in light of the evidence presented in the prior state court proceeding." 28 U.S.C. § 2254(d)(2); *see also Carter*, 110 F.3d at 1104.

B. *State Court Proceeding*

Petitioner, an African-American, was charged with intentionally causing the death of a hotel clerk during the course of a robbery. The state sought the death penalty. Jury selection began on February 3, 1986 and continued through March 5, 1986. The original venire consisted of 108 prospective jurors, including 18 African-Americans. Six of the African-American jurors were excused by agreement of the parties and one was struck for cause.[3] Both sides were then allowed 15 peremptory challenges. The prosecution used 10 strikes against African-Americans. The defense ex-

[3] The record shows that petitioner agreed to excuse Hilbert Gitchaway, Dora Randle, Vergie Miller, Jerry W. Moseley, Lourice Collier, and Johnnie Holma. (Pet. Supp. Brief, App. 1 at 60). Virginia Smith was struck for cause because of her views on the death penalty. (SF Voir Dire-II 1006).

ercised all 15 of its challenges against non-minorities. One African-American was seated on the jury.[4]

On March 9, 1986—just four days after the jury was empanelled—the *Dallas Morning News* ran a front-page story about jury selection practices in Dallas County criminal cases. *See Steve McGonigle & Ed Timms, Race Bias Pervades Jury Selection: Prosecutors Routinely Bar Blacks, Study Finds*, DALLAS MORNING NEWS, March 9, 1986 at Al. (Am. Petition, Exh. 3). The newspaper article examined the racial and ethnic composition of juries in 100 randomly selected felony trials between 1983 and 1984. Of 467 African-American jurors qualified to serve in those cases, 405 were peremptorily challenged by the state. The study found that African-Americans were five-times more likely to be removed from a jury panel than whites, and twice as likely to be struck as Hispanics. Indeed, 70 of the 100 trials studied during the relevant time period had no African-Americana jurors at all.[5]

This article prompted defense counsel to file a motion to quash the jury panel. The motion was heard on March 12,

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[4] The only African-American not challenged by the prosecution, Troy L. Woods, was the quintessential state's juror. When asked about his feelings on capital punishment, Woods stated:

> It's too quick. They don't feel the pain . . . Well, what I call punishment is back to the old Indian days. Pour some honey on them and stake them out over an ant bed. That's the way I feel about it. That's what I call punishment.

(SF Voir Dire-X 3848).

[5] The same authors also studied 15 capital murder trials in Dallas County between 1980 and 1986. *See Ed Timms & Steve McGonigle, A Pattern of Exclusion: Blacks Rejected from Juries in Capital Cases*, DALLAS MORNING NEWS, Dec. 21, 1986 at A1. (Am. Petition, Exh.10). Of 62 African-Americans qualified to serve as jurors in those cases, 56 were struck by the state with peremptory challenges. Only five African Americans served on capital murder juries during this time period. While five of the 15 cases involved African-American defendants, four of those defendants were tried by all-white juries. Ironically, petitioner was the only African-American defendant to have a trial before at least one member of his own race.

1986. At the hearing, petitioner attempted to show that the Dallas County District Attorney's office had an "unofficial policy" of excluding African-Americans from jury service. This policy dated back to the late 1950s, but was still being followed by some prosecutors at the time of petitioner's trial. Five current or former judges, two prosecutors, and two defense lawyers testified at the hearing.[6] One witness, former Assistant District Attorney Jon Sparling, testified about a memo he wrote in 1969 on jury selection in criminal cases. (SF-3/12/86 Hrg. 27-57 & Def. Exh. 1). This 19-page document is punctuated with racial, ethnic, religious, and gender-based stereotypes. For example, Sparling advises prosecutors that "[who you select, and what you qualify the panel on will depend on the type of crime, the age, color and sex of the [d]efendant . . ." (*Id.*, Def. Exh. 1 at 301) (emphasis added). He goes on to state that "[y]ou are not looking for any member of a minority group which may subject him to oppression" because "[m]inority races almost always empathize with the [d]efendant. (*Id.*, Def. Exh. I at 303, 305).

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[6] Among the witnesses to testify at the hearing was Jack Hampton, presiding judge of the 283rd Judicial District Court. Judge Hampton served as an Assistant District Attorney in the late 1950s. He recalled being reprimanded by District Attorney Henry Wade after allowing an African-American woman to serve on a jury in a DWI case. (SF-3/121/86 Hrg. 59-60). Significantly, Wade still served as Dallas County District Attorney when petitioner was tried in March 1986.

Other witnesses testified about more recent incidents of purposeful discrimination against African-American jurors. Harold Entz, presiding judge of Dallas County Criminal Court No. 4, said that one of his prosecutors wanted to shuffle a jury panel "because a predominant number of the first, six, eight, or ten jurors were blacks." (*Id.* at 104). This occurred within the past "three or four years." (*Id.* at 103). Another judge, Ed Kinkeade, testified that he thought prosecutors had systematically excluded African-Americans from juries in his court. (*Id.* at 112-13). This observation was confirmed by Judge Larry Baraka, who barred a prosecutor from conducting voir dire in his court after an incident in 1985. (*Id.* at 74-75, 77). Judge Baraka admitted that there had been "a systematic exclusion of blacks by the State from juries" in the past. However, he thought "things had improved considerably" since about 1980, (*Id.* at 75-76).

Sparling testified that his memo was used to train misdemeanor prosecutors and became part of a manual distributed to all members of the Dallas County District Attorney's office. (*Id.* at 2930).

At the conclusion of the hearing, the trial judge found that there was "no evidence presented to me that indicated any systematic exclusion of blacks as a matter of policy by the District Attorney's office." (*Id.* at 146). He therefore concluded that petitioner failed to establish a *Swain* violation. (*Id.*). The case proceeded to trial and petitioner was convicted of capital murder on March 26, 1986. One month later, the Supreme Court decided *Batson*.

On direct appeal, petitioner challenged the jury selection process under the more liberal Batson standard.[7] The Texas Court of Criminal Appeals found that petitioner had established an inference of purposeful discrimination because the prosecutor used "such a skewed number of strikes on the black veniremen" and "only a single black juror was seated on the panel." *Miller-El v. State*, 748 S.W.2d 459, 460 (Tex. Crim. App. 1988). However, the prosecutor was never given an opportunity to explain his use of peremptory challenges. The case was remanded to the trial court with instructions to conduct a *Batson* hearing. *Id.* at 460-61.

This hearing was held on May 10, 1988. Paul Macaluso, the prosecutor who conducted voir dire, testified as to his reasons for striking each of the 14 African-Americans from the jury panel. The trial court determined that these explanations were race-neutral and negated any inference of purposeful discrimination.[8] Specifically, the court found that: (1)

[7] The Supreme Court has held that *Batson* applies retroactively to cases pending on direct review at the time it was decided. *See Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S.Ct. 708, 716, 93 L.Ed.2d 649 (1987). Consequently petitioner was able to raise this claim for the first time on appeal.

[8] The trial court also found that petitioner failed to raise an inference of purposeful discrimination through the state's use of peremptory challenges. (Supp. Tr. at 4). However, this finding appears to be contrary to the decision of the Texas Court of Criminal Appeals. *See* Miller-El, 748 S.W.2d at 460 ("We find that appellant has established an inference as required by the *Batson* court.")

none of the explanations given by the prosecutor were based on group traits; (2) none of the jurors were questioned perfunctorily; (3) there was no disparate examination of the jurors; and (4) the primary reason given to support each peremptory challenge, the juror's reluctance to assess the death penalty, was closely and directly related to the facts of the case. (Supp. Tr. at 6-7). Petitioner challenged these findings on direct appeal. However, the Texas Court of Criminal Appeals found that the prosecutor's explanations were not "patently implausible or so contrary to the evidence as to be unworthy of belief as a matter of law." *Miller-El v. State*, No. 69,677, op. at 2 (Tex. Crim. App. September 6, 1992).

C. *Swain Claim*

Petitioner seeks federal habeas relief under both *Swain* and *Batson*. He argues that these cases have distinct applications and provide independent grounds for challenging discriminatory a jury selection practices. Petitioner urges this dichotomy so he can't take advantage of dicta in *Swain* analogizing a Fourteenth Amendment equal protection case to a Sixth Amendment fair cross-section claim once a *prima facie* showing of systematic discrimination has been made.[9] Since such evidence was presented in this case, petitioner maintains that he is entitled to an inference that the prosecutor used his peremptory challenges in a racially discriminatory manner.

This argument fails for several reasons. First, petitioner misreads *Swain*. While recognizing that "[t]otal exclusion of Negroes by the state officers responsible for selecting names of jurors gives rise to a fair inference of discrimination on their part," the Supreme Court held that

[9] The Sixth Amendment guarantees a defendant the right to trial by an impartial jury "drawn from a fair cross-section of the *community*." *Taylor* v. *Louisiana*, 419 U.S. 522, 536, 95 S.Ct. 692, 700, 42 L.Ed.2d 690 (1975).

"this rule of proof cannot be woodenly applied to cases where the discrimination is said to occur during the process of peremptory challenge of persons called for jury service." *Swain*, 85 S.Ct. at 839. The Court went on to explain:

> Unlike the selection process, which is wholly in the hands of state officers, defense counsel participate in the peremptory challenge system, and indeed generally have a far greater role than any officers of the State. It is for this reason that a showing that Negroes have not served during a specified period of time does not, absent a sufficient showing of the prosecutor's participation, give rise to the inference of systematic discrimination on the part of the State.

Id. Thus, *Swain* rejected any analogy to fair cross-section cases without proof that the prosecutor systematically. Used peremptory strikes against minorities over a period of time. *Id.* at 839-40. Historical evidence, standing alone, was never enough to prove a *Swain* violation.

Nor is there any authority for the proposition that Swain somehow survives *Batson*. In fact, *Batson* specifically overruled *Swain*. *Batson*, 106 S.Ct. at 1725 n.25 ("To the extent that anything in [*Swain*] is contrary to the principles we articulate today, that decision is overruled."). Moreover, the two cases are wholly complementary with regard to their treatment of historical evidence. Under *Swain*, a defendant was required to prove systematic discrimination as a prerequisite to an equal protection claim. *Swain*, 85 S.Ct. at 837-38. This requirement was abolished in *Batson*. *Batson*, 106 S.Ct. at 1722. However, historical evidence can still be used to establish a *prima facie* case of discrimination in the jury selection process. *Id.* at 1721-22. A defendant may show that the prosecutor in his case had a practice of striking minority jurors over a period of time. It then becomes incumbent upon the prosecutor to explain his use of peremptory challenges in light of that fact. Regardless of the type of evidence presented, the standard of proof remains the same. It makes no difference whether the defendant's prima facie case is based on historical evidence or the actions of the prosecutor at trial. The court must consider the "totality of relevant facts in determining whether purposeful discrimination exists in any particular case."

Finally, the Supreme Court has held that a defendant may not challenge the composition of a petit jury on the grounds that it does not represent a fair cross-section of the community. *Holland v. Illinois*, 493 U.S. 474, 487,110 S.Ct. 803, 811, 107 L.Ed.2d 905 (1990). Rather, such a claim applies only to the venire from which the jury is ultimately selected. *Id.*, 110 S.Ct. at 807. It therefore follows that the standards governing a fair cross-section claim under the Sixth Amendment are not applicable to an equal protection claim under the Fourteenth Amendment. *Cf. id.* at 806 (rejecting invitation to extend *Batson* standards to Sixth Amendment fair cross-section claims).

The Court concludes that *Swain* does not provide an independent basis for challenging the prosecutor's use of peremptory challenges in this case. Petitioner's equal protection claim must be analyzed under the standard of proof articulated in *Batson*.

D. *Batson Claim*

Petitioner characterizes the evidence supporting his equal protection claim as "copious and multifaceted." (Am. Petition at 15). This is an understatement. His amended petition contains 202 pages of argument on this point, with citations to numerous state and federal authorities. Succinctly stated, petitioner contends that the jury selection practices employed by the state in his case were unconstitutional because: (1) the prosecutors had a documented history of using peremptory challenges against minorities in other cases; (2) African-American jurors were subjected to disparate questioning on the issue of minimum punishment; and (3) the state accepted non-minority jurors with the same characteristics as African-Americans who were struck by the prosecution. A brief discussion of these arguments, none

of which were presented to the state court, is necessary to the disposition of this claim.[10]

1. *Other Cases*

Petitioner maintains that two of the prosecutors in his case, Paul Macaluso and Jim Nelson, "had a history of discriminating against African Americans in jury selection and that this practice continued at his trial." (Am. Petition at 59). As proof of discriminatory intent, he cites two other cases involving the same prosecutors. *Chambers v. State*, 784 S.W.2d 29 (Tex. Crim. App. 1989), *cert. denied*, 110 S.Ct. 2602 (1990); *Dorothy Jean Miller-El v. State*, 790 S.W.2d 351 (Tex. App.-Dallas 1990, pet. ref'd).[11] Both cases were reversed for *Batson* violations. Even assuming that this evidence constitutes a pattern of systematic discrimination, it is only relevant in determining whether petitioner has established a *prima facie* case under *Batson*. The state court already found that petitioner has met this burden. *Miller-El*, 748 S.W.2d at 460. Consequently, the focus shifts to the explanation proffered by the prosecution for its use of peremptory challenges. Historical evidence is of limited value in assessing whether the race-neutral explanations articulated by the prosecutor were a pretext for discrimination in this case.

2. *Improper Questioning*

Petitioner also contends that all African-American jurors were subjected to disparate questioning on the issue of minimum punishment. He points out that non-minority "pro-death penalty" jurors were fully informed of the range

[10] The Court asked the parties to brief the issue of whether petitioner fairly presented the factual basis of his "improper questioning" and "comparative juror analysis" claims in state court. See ORDER, 7/28/99. Respondent conceded that these arguments "are subsumed within the broad *Batson* issue and are not tantamount to the presentation of a new claim." (Resp. Supp. Brief at 2). Therefore, the Court will consider these claims on the merits.

[11] Dorothy Jean Miller-El is petitioner's wife. She was convicted of murder and attempted capital murder in a separate trial.

of punishment for murder and asked whether they could keep an open mind on the subject. However, the prosecutor posed the same question to non-minority "anti-death penalty" jurors and—all African-American jurors in an open-ended manner. These jurors were asked, "What do you personally feel ought to be the minimum punishment for somebody committing a murder?" (SF Voir Dire-I 307-17). Most of the jurors responded with sentences well in excess of the statutory minimum of five years. When the prosecutor informed the jurors of the actual range of punishment, many felt that the minimum sentence was too lenient. As a result, they effectively disqualified themselves from serving on the jury.[12]

Obviously, petitioner intends to show that the prosecutors were of a mind to discriminate. However, no African-American jurors were peremptorily challenged because of their views on minimum punishment. Nor were any African-Americans struck for cause on that basis. Once again, the relevant inquiry in this case is whether the race-neutral explanations proffered by the state for its use of peremptory challenges were pre-textual. If those reasons withstand scrutiny, there is no equal protection violation. Any evidence about the prosecutor's motivation for asking a question that did not form the basis of a peremptory challenge is simply irrelevant.

3. *Comparative Juror Analysis*

The prosecutor explained that he struck nine African-American jurors because of their attitude toward the death penalty or their reluctance to serve on a death penalty

[12] Texas law allows the prosecution to challenge a prospective juror who demonstrates "bias or prejudice against any phase of the law upon which the State is entitled to rely for conviction or punishment." TEX. CODE CRN. PROC. ANN. art. 35.16(b)(3) (Vernon 1989). Thus, the state may strike a juror who cannot agree to consider the minimum punishment. *Phillips v. State*, 701 S.W.2d 875, 884 (Tex. Crim. App. 1985), *cert. denied*, 106 S.Ct. 3285 (1986).

jury.[13] Another African-American was struck because of her views on rehabilitation. Petitioner contends that these explanations were pretextual because non-minorities with the same or similar characteristics were accepted by the state. Consideration of this argument requires a careful review of the voir dire examination of each challenged juror.

a. *Juror Bozeman*

Roderick Bozeman was the seventh juror on the venire panel and the first African-American questioned. Bozeman said that he believed in capital punishment, but might have a problem sitting on a death penalty jury. (*Id.* at 282). When asked to explain his answer, Bozeman stated:

> It would be actually the weight of, I guess, thinking about the death penalty and that would be the real thing behind it, I guess. I wouldn't have any problem serving on the jury, I don't think.

(*Id.* at 284). The prosecutor then inquired whether Bozeman could answer the special issues on punishment based solely on the evidence presented at trial, "knowing full well that [it might] result in the execution of somebody who you personally don't desire to be executed." (*Id.* at 301).[14] Bozeman responded:

[13] Petitioner admits that four African-American jurors—Linda C. Baker, Anna L. Keeton, Paul Bailey, and Janice Mackey—were properly challenged because of their extreme reluctance to serve on a death penalty jury. (Am. Petition at 135 n.52).

[14] Three special issues are submitted to the jury at the conclusion of the punishment phase of a capital murder trial. These questions are:

> (1) Whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result?
>
> (2) Whether there is a reasonable probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society?

> I don't know. I would like to think I could, but I don't think I could. If I didn't feel like he deserved it, I don't think I could go for the death penalty.

(*Id.*). A short time later, Bozeman changed his answer. He said, "I'd have to vote with the proof, you know, no matter how I felt. If the answer was yes, then I would have to put yes no matter how I felt about it." (*Id.* at 306). The prosecutor struck Bozeman based on his "feelings on the death penalty" and his "obvious hesitation." (*Id.* at 323).

Petitioner contends that these reasons were pretextual because five non-minority jurors accepted by the prosecution also had misgivings about the death penalty or their ability to serve on the jury.[15] However, such a subjective consideration is not easily assessed from a cold record. *See United States v. Alston*, 895 F.2d 1362, 1367 n.5 (11th Cir.1990) ("The attributes relied upon by the prosecutor in striking potential jurors are not always easily compared . . . and often require an evaluation of the degree to which the prospective juror manifests the stated attribute.").

Disparate treatment cannot automatically be imputed in every situation where the state rejects one juror with the same characteristics as another juror who is accepted. Indeed, the decision to strike a particular juror "may be influenced by intuitive assumptions that are not fatally suspect merely because they are not quantifiable." *United States v. Lance*, 853 F.2d 1177, 1181 (5th Cir. 1988). *See also Matthews v. Evatt*, 105 F.3d 907, 918 (4th Cir.) *cert. denied*, 118

> (3) Whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased?

TEX. CODE CRIM. PROC. ANN. art. 37.071(b)(Vernon 1981). An affirmative finding on all three issues by a unanimous jury results in a death sentence. *Id.* art. 37.071(e).

[15] These jurors are identified as Noad O. Vickery, Ronald Salsini, Marie H. Mazza, Gwendolyn Smale, and Joan Weiner. Ironically, petitioner struck Vickery, Salsini, and Smale. (Pet. Supp. Brief, App. 1 at 0059).

S.Ct. 102 (1997) (both prosecutor and defense counsel must be allowed to make credibility determinations when exercising peremptory challenges).

The record does not reflect the demeanor of Bozeman or the non-minority jurors who expressed doubts or hesitancy about the death penalty. The tone of voice, facial expressions, and other physical qualities of these juror all bear on the assessment of whether their hesitation was merely passing or more deeply-rooted. The trial judge personally observed the proceedings and accepted the prosecutor's explanation for striking Bozeman. The Court must defer to that credibility determination. *Hernandez*, 111 S.Ct. at 1869; *Bentley-Smith*, 2 F.3d at 1373.

Nor is the fact that Bozeman later affirmed his ability to assess the death penalty necessarily dispositive. The use of peremptory challenges is often influenced by intuitive assumptions. *Lance*, 853 F.2d at 1181. The prosecutor is certainly allowed to conclude that a juror's initial indecision may not bode well for the state. *See Caldwell v. Maloney*, 159 F.3d 639, 655-56 (1st Cir.1998), *cert. denied*, 119 S.Ct.1152 (1999) ("[T]he prosecutor "had no obligation either to ignore [the juror's comments about her reluctance] or to accept at face value [the juror's] prediction that, in the end, [she] could put aside [her] problem and do it right.") (citation omitted). Such "gut reactions" are the essence of a peremptory challenge.

b. *Juror. Fields*

Billy Jean Fields was the second African-American juror struck by the state. A considerable portion of his voir dire examination focused on the special issue concerning future dangerousness. The prosecutor asked, "What sort of evidence do think would aid you . . . in deciding whether or not this is the type of individual that would probably do something of a criminal nature again?" (SF Voir Dire-I 419). Fields responded that he would want information about the defendant's background. (*Id.* at 420, 422). The following colloquy then occurred:

Q: [BY PROSECUTOR]. Let me just ask you briefly: What does that word probability mean to you in that connotation?

A: [BY JUROR]: Well, it means is there a possibility that he will continue to lead this type of life, will he be rehabilitated or does he intend to make this a life-long ambition.

Q: Let me ask you, Mr. Fields, do you feel as though some people simply cannot be rehabilitated?

A: No.

Q: You think everyone can be rehabilitated?

A: Yes.

Q: I'm just curious. How would you ever know that there is somebody that—well, you said something earlier, but I can't remember exactly what it was, about whether or not somebody could be rehabilitated in conjunction with one of my questions earlier. You said that would tell you whether or not somebody could possibly be rehabilitated?

A: Well, I think you're talking about the fact of whether or not it was premeditated. It may be far-fetched, but I feel like, if a person has the opportunity to really be talked about God and he commits himself, whereas he has committed this offense, then if he turns his life around, that is rehabilitation . . . . I feel like when an individual has really been truly reached by someone reading the word of God to him and they are repentant and they do have a real act of contrition, they can be rehabilitated and that's been demonstrated. F.2d at 1181.[16]

C. *Juror Warren*

The state used its sixth peremptory challenge against Joe Warren, another African-American member of the ve-

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[16] Petitioner argues that the other reason given by the prosecutor for striking Fields—that his brother had been convicted of a felony--was also pretextual. (SF Voir Dire-I 455). The Court need not address this argument in light of upholding the validity of the prosecutor's first explanation.

nire panel. When asked by the prosecutor whether he felt the death penalty accomplished a particular purpose, Warren responded:

> Yes and No. Sometimes I think it does and sometimes I think it don't. Sometimes you have mixed feelings about things like that.
>
> * * * *
>
> I don't know. It's really hard to say because I know sometimes you feel that it might help to deter crime and then you feel that the person is not really suffering. You're taking the suffering away from him. So it's like I said, sometimes you have mixed feelings about whether or not this is punishment or, you know, you're relieving personal punishment.

(SF Voir Dire-III 1532). At the *Batson* hearing, the prosecutor cited this answer as one of the reasons for striking *Warren*. (SF-5/10/88 Hrg. 31). He went on to explain that "at that point in the voir dire examination with nine strikes remaining, we thought it would be best to exercise a peremptory challenge. We did not think he would be a favorable juror for the State." (*Id.* at 32).

Petitioner points out that two non-minorities who had mixed feelings about the death penalty were not struck by the prosecution.[17] However, these jurors were not similarly situated to Warren. After stating that life imprisonment might be a fate worse than death, both non-minority jurors firmly asserted their belief that capital punishment was a deterrent to crime. (SF Voir Dire-III 3264-65; Voir Dire-VIII 1074-75). By contrast, Warren suggested that the death penalty might not serve any purpose. (*Id.* Voir Dire-III 1532). Clearly, his feelings on the subject were more ambivalent than the non-minority jurors accepted by the state. This indecision, coupled with the fact that the state still had nine peremptory strikes remaining, adequately

[17] These jurors are identified as Sandra Jenkins and Kevin Duke.

supports the prosecutor's race-neutral explanation for challenging Warren.

d. *Jurors Kennedy, Rand & Boggess*

Three other African-American jurors—Wayman Kennedy, Edwin Rand, and Carrol S. Boggess-were struck by the prosecution because of their answers to certain questions about the death penalty. There is ample support in the record to support the exercise of these peremptory challenges.

All three jurors voiced concerns about sitting on a death penalty jury or imposing capital punishment in this type of case. Kennedy testified that the death penalty was only appropriate in "extreme cases . . . like a mass murder," and that a life sentence was sufficient for murder occurring during a robbery. (*Id.* Voir Dire-V 2176, 2178). He repeatedly refused to take a firm position on his ability to assess the death penalty until he heard the evidence. (*Id.* at 2182-94). Rand acknowledged that he had doubts about his ability to participate in assessing the death penalty. At first, he told the prosecutor that "somewhere along the line, I would probably think to myself, you know, 'Can I do this?' You know, right now I say I can, but tomorrow I might not." (*Id.* Voir Dire-IV 1805-06). Later, Rand said that he could impose a death sentence if warranted by the evidence. (*Id.* at 1809-11). Boggess was even more direct. Although she would serve on the jury if selected, Boggess said that "I wouldn't want to serve and I wouldn't want to have that responsibility to do that . . ." (*Id.* at 2008).

Petitioner argues that the views expressed by these African-American jurors were similar to those of non-minorities who were accepted by the state. However, the record does not support this assertion. None of the non-minority jurors identified by petitioner ever said that the death penalty was not appropriate for a murder committed during the course of a robbery or that they did not want to serve on the jury. Moreover, some of the African-American jurors were struck because of their reluctance or hesitancy in answering questions about the death penalty. These sub-

jective qualities are best judged by the trial court. *See Hernandez*, 111 S.Ct. at 1869; *Bentley-Smith*, 2 F.3d at 1373.

4. *Conclusion*

Petitioner has adduced a considerable amount of evidence showing that the Dallas County District Attorney's office had an unofficial policy of excluding African-Americans from jury service in years past. There is no other explanation for the appalling statistics brought to light by the *Dallas Morning News* in March 1986. Several judges and defense lawyers confirmed that prosecutors often used peremptory challenges against African-Americans and other minorities for no apparent reason other than race. Then there is the "Sparling Memo"--the article on jury selection that taught Dallas County prosecutors to strike prospective jurors on the basis of race, religion, ethnicity, and gender. Although this evidence is disturbing, it is not dispositive of petitioner's *Batson* claim.

In order to prove an equal protection violation, petitioner must show that the prosecutor used peremptory challenges to purposefully exclude African-Americans from the jury in his case. The historical evidence cited by petitioner helps him establish a *prima facie* case of discrimination. However, he also must demonstrate that the race-neutral explanations offered by the prosecution were merely pretextual. This heavy burden is heightened by the onerous standard of review in federal habeas cases. Here, the trial court found that "the primary reasons for the exercise of the challenges against each of the veniremen in question, their reluctance to assess or reservations concerning the imposition of the death penalty, were closely and directly related to the facts of the case" and negated any inference of discrimination. (Supp. Tr. at 6-7). The record supports this determination. Consequently, the finding is not "unreasonable."

See 28 U.S.C. § 2254(d); *Drinkard*, 97 F.3d at 769. This ground for relief is without merit and should be overruled.[18]

V.

CHALLENGE FOR CAUSE

(Ground 5)

Next, petitioner contends that the trial court improperly excused a prospective juror for cause based on her reluctance to impose the death penalty.

A. *Applicable Law*

The Sixth Amendment to the United States Constitution guarantees a defendant the right to trial by an impartial jury. U.S. CONST. amd. VI. This prevents the imposition of punishment in a capital case by a jury organized to guarantee a death sentence. *Witherspoon* v. *Illinois*, 391 U.S. 510, 521-22, 88 S.Ct.1770,1776-77, 20 L.Ed.2d 776 (1968). Still, a potential juror may be excused for cause if his views on capital punishment would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright* v. *Witt*, 469 U.S. 412, 424,105 S.Ct. 844, 852, 83 L.Ed.2d 841 (1985), *quoting Adams v. Texas*, 448 U.S. 38, 45,100 S.Ct. 2521, 2526, 65 L.Ed.2d 581 (1980). Juror bias need not be proved by "unmistakable clarity." *Witt*, 105 S.Ct. at 852. Rather, the trial judge has discretion to determine whether a prospective juror can faithfully and impartially apply the law. *Id.* at 852-53. This determination is entitled to a presumption of correctness and should be reversed only in a "clear case." *Id.* at 854 n.9, *quoting Reynolds v. United States*, 8 Otto 145, 98 U.S. 145, 156-57, 25 L. Ed. 244 (1879).

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[18]/ The Court also notes that an African-American served on the jury. The Fifth Circuit has suggested that this may be sufficient to negate a claim of purposeful discrimination. *See United States* v. *Ratcliff*, 806 F.2d 1253, 1256 (5th Cir. 1986), *cert. denied* 107 S.Ct. 1625 (1987) (no hint of racial discrimination where two of the remaining twelve jurors were black).

B. *Discussion*

All potential jurors were questioned about their feelings on capital punishment. One juror, Joyce Willard, explained her views on the subject as follows:

> Well, I feel that-of course, I know the bible says an eye for an eye and a tooth for a tooth, but to go further into detail, I feel like if you go and have premeditated thoughts about doing somebody bodily injury, then yes I do believe in the death penalty. If murder was not the utmost in your mind, them I'm not real sure what I—I don't know if I can give you an answer on that or not. I have mixed emotions about that.

(SF Voir Dire-VIII 3092). Willard later expressed reservations about imposing the death penalty for a murder that was not "premeditated." (*Id.* at 3095-96) The prosecutor told Willard that premeditation was not an element of capital murder. Rather, the state was only required to prove that the defendant "did knowingly or intentionally cause the death of an individual" while in the course of committing robbery. (*Id.* at 3098-99). . After the prosecutor explained the elements of the offense in more detail, Willard said:

> [I]f it is proven and you have proved that this gentlemen has done these two things, if he went in there and intentionally caused someone—in the process he killed someone and it was proven that this happened-I don't know if there were any witnesses or what, but—I would have to go along with the death penalty then.

(*Id.* at 3102). The prosecutor then asked Willard if she could serve on a death penalty jury. At first she replied:

> That is very difficult for me to decide. Like I say, a human life is on trial here. I know one has been taken and I don't believe in taking a human life, of course. I have always had kind of mixed emotions, but I felt like somebody who took someone's life should be assessed the death penalty. Like I say, I don't—I may be contradicting what I told you before. I don't know if I could really assess the death penalty to another human life. If it came down to the point where it was proven to me beyond a shadow of a doubt that he was guilty, then I'm sure I could.

(*Id.* at 3106-07). Willard became equivocal upon further questioning by the prosecutor. (*Id.* at 3110-113). When pressed for a definite answer as to her ability to serve on the jury, Willard responded "no." The prosecutor then asked:

> Are you telling me that you would not take the oath because you don't feel like you are suited or you can serve on this type of a jury? If you're telling me that, that's fine.

Willard answered, "I believe that's what I'm telling you." (*Id.* at 3117).

Defense counsel attempted to rehabilitate this juror. He asked whether she could follow her oath by rendering a verdict based on the law and the evidence. Willard responded:

> If I were on the jury and had to be a part of rendering the verdict, I guess it would be--it would be difficult to render a verdict even though, like I told you, I do believe in capital punishment. If that was what was necessary to do and I were on the jury, I probably could go along even though it would be with me for the rest of my life.

(*Id.* at 3122). Willard continued to speculate as to her ability to take the oath: At one point Willard told defense counsel that she "would have to take the oath before I could be on the jury," but "I wouldn't want to." (*Id.* at 3124, 3127-28).

Eventually, the trial court intervened. The judge asked Willard if her personal feelings would interfere with her judgment about the law and the evidence in the case. Willard said, "Well, knowing me I would probably break down." (*Id.* at 3143). However, she reluctantly acknowl-

edged her ability to answer the special issues based on the evidence. (*Id.* at 3148-49).

The judge then asked:

> Q: (THE COURT]: [C]an you take the oath to follow the law and then discharge your duties as a juror or can you not take an oath and do that, that is discharge your duties as a juror, whatever they may call you to do? Can you give me a yes or no and there won't be any more questions?
>
> A: WILLARD: I guess I better answer you no.
>
> Q: Ms. Willard, no, you could not take the oath, right?
>
> A: I don't guess I could after all these things have been put to me. I thought maybe I could, but after the way things have been presented to me and the way I'm understanding things, if I'm understanding correctly, then I don't believe I could.

Q: One foal quibble with you. You used the words I think and unfortunately—you said no and then you said I think. Is it no, I cannot do it or yes, I can do it or—

A: Okay. We'll put no I cannot do it.

(*Id.* at 3150-51).

The trial court excused Willard for cause. Petitioner now contends that Willard only began expressing doubts about her ability to sit on the jury after the prosecution presented a distorted and manipulative view of Texas law. He accuses the prosecutor of attempting to sow artificial doubt in the mind of this juror by "hammer[ing] home the grisly realities of the death sentence, while offering [her] an "escape hatch" to avoid jury service by implying that she need not serve if doing so would trouble her conscience." (Am. Petition at 293). The Court has carefully reviewed the voir dire examination and finds no evidence of impropriety. Evidently, neither did defense counsel since he never objected to any of the prosecutor's questions. The lengthy colloquies involving Willard's ability to take the oath and serve on the

jury were the result of her own indecision and equivocation—not any improper questioning by the prosecutors.

Petitioner further argues that there was no legal basis to strike Willard for cause. He points out that Willard believed in capital punishment. She merely "expressed hesitation and emotional turmoil at the prospect of rendering a verdict that would result in another person being killed." (Am. Petition at 303). If this were the extent of her testimony, Willard might not be disqualified. *See, e.g. Alderman v. Austin*, 663 F.2d 558, 563 (5th Cir.1981), *aff'd on reh'g*, 695 F.2d 124 (5th Cir.1983) (jurors who favored capital punishment and could vote to inflict the death penalty were not disqualified because of inability to sign verdict form). However, Willard also stated that she could not take the oath and discharge her duties as a juror. At best, her testimony was ambiguous and contradictory. (SF Voir Dire-VIII 3146, 3148-49, 3115, 3127). The trial court struggled with this issue and concluded that "[Willard's] view about participating in the death penalty process would prevent or substantially impair her performance of her duties as a juror in this case." (*Id.* at 3155). As the Supreme Court has noted:

> What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear;" these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law . . . *[T]his is why deference must be paid to the trial judge who sees and hears the jurors.*

Witt, 105 S.Ct. at 852 (emphasis added). Such is the case here. The trial judge had an opportunity to observe Willard's demeanor and assess her credibility. He ulti-

mately concluded that she could not take the oath and accept the duties of her office. Petitioner has failed to establish that this determination was "unreasonable . . . . in light of the evidence presented in the state court." 28 U.S.C. § 2254(d). This ground for relief should be overruled.[19]

VI.

COMPETENCY

(Grounds 3 & 4)

Petitioner raises two arguments regarding his mental competency. First, he contends that the trial court should have conducted a competency hearing. Second, he claims that he was not competent to stand trial.

A. *Applicable Law*

Due process prohibits the trial of a defendant who is mentally incompetent. *Godinez v. Moran*, 509 U.S. 389, 396,113 S.Ct. 2680, 2685, 125 L.Ed.2d 321(1993); *Pate* v. *Robinson*, 383 U.S. 375, 378, 86 S.Ct. 836, 838,15 L.Ed.2d 815 (1966). This means that a defendant must have the "capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense . . ." *Drope* v. *Missouri*, 420

[19] Although not mentioned in his brief, petitioner has provided the Court with a copy of the Findings and Recommendation of Magistrate Judge Charles Bleil in *Troy Dale Farris* v. *Gary Johnson*, No. 4-94-CV-0142-Y (N.D. Tex. January 21, 1997) (Am. Petition, Exh. 35). The issue presented in Farris is similar to the one raised by petitioner in the instant casewhether a prospective juror was improperly excused for cause based on her opposition to the death penalty. Judge Bleil noted that the juror consistently maintained she could answer the special issues on punishment and follow the law given by the court. Consequently, there was no legal basis to challenge the juror for cause. *Farris*, No. 4-94-CV-0142-Y, op. at 55-56.

Unlike the juror in *Farris*, Joyce Willard said that she could not take the oath or discharge her duties as a juror. This fact alone distinguishes the two cases. More importantly, Judge Bleil's recommendation was rejected by the district judge. *Farris* v. *Johnson*, 967 F.Supp. 204, 206 (N.D. Tex. 1997), aff'd, 144 F.3d 50 (5th Cir.) (Table), *cert. denied*, 119 S.Ct. 516 (1998). Therefore, Farris does not dictate a contrary result.

U.S.162,171, 95 S.Ct. 896, 903, 43 L.Ed.2d 103 (1975). *See also Dusky* v. *United States*, 362.U. S. 402, 402, 80 S.Ct. 788, 789, 4 L.Ed.2d 824 (1960). The burden of establishing mental incompetency is extremely heavy. In order to obtain habeas relief, a petitioner must show that the facts are 'sufficient to positively, unequivocally and clearly generate a real, substantial and legitimate doubt' as to his mental competency at the time of trial." *Dunn* v. *Johnson*, 162 F.3d 302, 306 (5th Cir. 1998), *cert. denied*, 119 S.Ct. 1507 (1999), *quoting Washington* v. *Johnson*, 90 F.3d 945, 950 (5th Cir. 1996), *cert. denied*, 117 S.o. 1259 (1997).

State courts must employ procedures designed to protect against the trial of incompetent defendants. *Drope*, 95 S.Ct. at 904-05; Pate, 86 S.Ct. at 842-43. A competency hearing is required "if the evidence raises a bona fide doubt as to the defendant's competency at that time." *Lokos* v. *Capps*, 625 F.2d 1258, 1261 (5th Cir. 1980). The trial court should consider: (1) any history of irrational behavior; (2) the bearing and demeanor of the defendant in court; and (3) prior medical opinions. *See Dunn*, 162 F.3d at 305; *Reese* v. *Wainwright*, 600 F.2d 1085, 1091 (5th Cir.), *cert. denied*, 100 S.Ct. 487 (1979).

B. *Medical Evidence*

Petitioner was shot by Houston police officers at the time of his arrest on November 21, 1985.[20] He sustained serious abdominal injuries and was taken to Ben Taub Hospital for treatment. Surgeons removed part of his intestines, repaired damage to his internal organs, and performed a doublebarreled colostomy. Petitioner remained hospitalized for eight weeks. During this time, he experienced complications and underwent an exploratory laparotomy to remove adhesions. Petitioner lost a total of 57 pounds during his

[20] Petitioner fled to Houston after he killed a motel clerk in Irving, Texas. He was apprehended five days later by Houston police officers. The shooting occurred when petitioner approached one of the officers with a KG99 machine gun as he was attempting to evade arrest. (SF Trial-II 687, 698-704).

hospital stay. He was eventually discharged to the custody of Harris County officials on January 12, 1986. (Am. Petition, Exh. 18).

Four days later, petitioner arrived at the Dallas County Jail. He complained of pain at his colostomy site and swollen extremities. Petitioner was treated with a variety of medications and placed on a double portion diet to regain weight. Jail records show that petitioner began experiencing chest pain on January 21, 1986. The next day, his symptoms included "chills and fever." Petitioner was given Motrin and Septra, an antibacterial medication. A wheelchair was ordered so he could go to court. However, petitioner no longer needed a wheelchair by the time jury selection began on February 3, 1986. (*Id.*, Exh. 21 & 22).

At the end of the first week of jury selection, petitioner still had chest pain, chills, and fever. This prompted the trial judge to order a medical evaluation. (*Id.*, Exh. 21). Petitioner was taken to Parkland Hospital on February 10, 1986, where he was diagnosed with pneumonia. He was discharged the same day with a prescription for Darvocet and Erythromycin. (*Id.*, Exh. 24). Jury selection resumed the next morning.

Petitioner continued to complain of chest pain throughout the month of February. He also reported delays in the receipt of his medication.[21] On February 19, 1986, the trial judge asked the jail doctor to determine whether petitioner needed more pain medication for his "well-being." (*Id.*, Exh. 27). Dr. Adrian Collyns responded to this inquiry on February 24, 1986. He advised the judge:

> I have seen this man professionally on a number of occasions recently. A chest Xray on Feb. 21, 1986 was done. In my opinion he does not now require prescription pain killers.

(Am. Petition at 231).

[21] Petitioner alleges that the jail medical staff "continually failed to [administer] his antibiotics and pain medication on schedule." (Am. Petition at 22.7). Tae Court acknowledges that the medical records are less than clear on this point. However, this ambiguity does not necessarily establish that the medications were not given as directed.

The next day, defense counsel protested that petitioner had not been getting his medication on a regular basis. Petitioner then told the judge that he had not seen a doctor since his last visit to Parkland Hospital on February 10, 1986.[22] The judge replied:

> [THE COURT]: Mr. Cunningham and Mr. West, the only thing I can say—first of all, I received a letter from a Dr. Adrienne [sic] H. Collyns, which I'll make part of the Court's file, and it says in so many words, as of February 24th, he does not have the opinion that the Defendant needs pain killer prescriptions. Now, whether he needs other medicines, I don't know. I'm not obviously a doctor. I'm going to be guided by what the jail doctors say. If you-all have any suggestions, I'll be glad to help you in any way I can.
>
> [DEFENSE COUNSEL]: If he says as of February 24th, that would be yesterday and I don't know if the doctor. would say that if he hasn't seen him.
>
> [THE COURT]: I got this letter delivered to me late yesterday afternoon after we recessed.
>
> [DEFENSE COUNSEL]: I would ask the Court to at least have whoever that doctor is examine Mr. Miller-El and I would also like to talk with him to see whether or not-what he is using to base that on for Mr. Miller-El's benefit because he tells Mr. West and he tells myself that he's hurting and he needs some medicine. We don't want him to think that we're not advising the Court.

[22] Petitioner acknowledged that he had seen a nurse as recently as February 20, 1986, but "they say that they can't do nothing." (SF Voir Dire-VII 2782).

> [THE COURT]: I'm advised and I'm pretty well guided by what the doctor says. Let me suggest that you and Mr. West talk to Dr. Collyns or the jail nurse up there and see what their answers are to your questions. If there is a dispute, I'll be glad—
>
> [DEFENSE COUNSEL]: Mr. West will track it down, Judge, and we'll go on with Ms. Williams.

(SF Voir Dire-VII 2782-84).

Petitioner was examined again by Dr. Collyns on February 26, 1986. He complained of constant chest pain that worsened at night. The doctor noted some tenderness and mild swelling over the right inferior scapula area. His lungs were clear with good breath sounds. Based on the results of this examination, Dr. Collyns concluded that petitioner was "fit to attend court." (Am. Petitioner, Exh. 21).

These symptoms persisted for several more days. During this time, petitioner continued to receive antibiotics and nonprescription medications. Then on March 4, 1986—just two days before jury selection coucluded—petitioner was taken to Parkland Hospital for treatment of a chest abscess. He developed an infection and returned to the hospital six days later. A follow-up visit was scheduled for March 12, 1986 However, wound care was provided by the jail medical staff instead. (*Id.*, Exh. 21 & 22).

The next entry in petitioner's medical chart is dated March 20, 1986—one week after the trial began. Petitioner complained of soreness around his rib cage and asked to see a doctor. The next day, the following exchange occurred in open court:

> [PROSECUTOR]: Mr. Hall, you have previously identified the man sitting at the end of the table-
>
> [DEFENSE COUNSEL]: Your Honor, we'll object. He's not *sleeping.*
>
> [PROSECUTOR]: Well, he was when I was—
>
> [DEFENSE COUNSEL] : Your Honor, I would object to the side-bar remark.

> [THE COURT]: Sustained. Disregard that, ladies and gentlemen.

(SF Trial-III 1151) (emphasis added).[23] The trial court then recessed the proceedings until March 24, 1986.

Shortly after the trial resumed, the state concluded its case-in-chief. The defense rested without presenting any evidence and both sides closed. At that point, the trial judge advised petitioner of his right to testify and the consequences of doing so. Petitioner said that he understood his rights but did not want to testify. The court then stated:

> [THE COURT]: [I]t might be a bit late to ask this question, but I've seen no evidence that the Defendant is not competent to either stand trial or make these decisions on his own behalf
>
> [DEFENSE COUNSEL]: *Your Honor, to the best of my knowledge, Mr. Miner-El is competent and is aware of the facts and knows what is going on. Is that true, Mr. Miller-El?*
>
> [DEFENDANT]: Yes.
>
> [THE COURT]: Well, I'll note for the record that throughout the trial including voir dire that this Defendant appeared, from the bench, to participate actively with his lawyers in jury selection decisions and also during the trial as regards cross-examination of witnesses and such as that. Having heard nothing else, I'm going to find that he makes his decision competently and I, of course, will honor it.

(*Id.* at 1197-98) (emphasis added).

The guilt-innocence phase of the trial ended that day with a finding of guilt. Later that evening, petitioner com-

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[23] It is not clear whether the prosecutor actually referred to petitioner as 'the man sleeping at the end of the table' or whether defense counsel misunderstood the question. However, the record reflects that petitioner was seated at the end of the table next to his attorneys. (SF Trial-I 419).

plained of nausea and a problem with his colostomy bag. (Am. Petition, Exh. 21). The trial judge ordered a medical evaluation to determine whether petitioner was "able to sit thru court." (*Id.*, Exh. 29). Petitioner was taken to Parkland Hospital and kept overnight for treatment of a small bowel obstruction. (*Id.*, Exh. 24). The punishment phase of the trial commenced on March 25, 1986—the same day petitioner was released from the hospital. The following afternoon, the jury sentenced him to death. Petitioner continued to have problems with his colostomy bag and recurrent infections over the next eight months. His condition finally improved after surgeons closed his colostomies in November 1986. (*Id.*, Exh. 21, 24, 30-32).

C. *State Habeas*

Proceeding Petitioner did not challenge his mental competency on direct appeal. Instead, he first raised the issue in an application for writ of habeas corpus.[24] Petitioner alleged, *inter alia*, that he was not competent to stand trial due to his debilitating physical injuries, complications arising from his surgeries, and the side effects of pain medication. The state answered these allegations in a written response. Both parties submitted supplemental briefs and expert affidavits in support of their respective positions.

The state relied on the Affidavit of Steven P. Bowers, Medical Director for the Dallas County Jail System. Dr. Bowers reviewed selected portions of petitioner's medical records and a chronology of events prepared by the state. He noted that petitioner was on a number of medications during his trial. However, the only medication that might have affected him to any degree was Darvocet. Dr. Bowers explained that Darvocet is "relatively low in strength compared to other prescription pain medications." According to the medical records, petitioner received two Darvocet tablets three tunes a day. This is less than the maximum allowable dosage. Dr. Bowers found no indication that petitioner was impaired by any of his medications. He did not exhibit a pattern of recurrent drowsiness, stupor, being difficult to arouse, or any bizarre behavior. Although petitioner was transported to the hospital several times during his trial, Dr. Bowers noted that each treatment was less than 24 hours in duration. This indicated that most of his medical problems were not serious. Based on this evidence, Dr. Bowers concluded that petitioner was competent to stand trial and assist in his defense. (Am. Petition, Exh. 25).

[24] Petitioner filed his application for post-conviction relief on May 16, 1995—nearly nine years after his trial concluded and just hours before his scheduled execution.

Petitioner countered with the Affidavit of Ari Kiev, a board-certified psychiatrist. Dr. Kiev reviewed all of petitioner's medical records and evidence submitted by both parties in the state habeas proceeding. This evidence showed that petitioner was in a weakened condition at the time of his discharge from Ben Taub Hospital on January 12, 1986. Petitioner was anemic, had a substantially reduced blood volume, and lost a considerable amount of weight. He also experienced complications with his colostomies, suffered from pneumonia, developed recurrent infections, and frequently complained of pain throughout the trial. Dr. Kiev noted that petitioner was medicated with Darvocet, which "can sometimes produce sedation and dizziness as side effects." He believed that petitioner may have experienced some of these symptoms while taking the medication. Dr. Kiev stated that the combination of these factors, together with an inadequate diet and sleep deprivation, "contributed to an inability of [petitioner] to participate fully and to the best of his normal abilities in the preparation and presentation of his own defense . . ." He then offered this rather bold assessment of petitioner's mental state:

> [Petitioner], because of the depressive effects of a prosthesis such as a colostomy, which reduces the recipient's ability to deal with stress, his physical debilitation and a depressive reaction secondary to his injury and circumstances, which produces apathy and lethargy, had given up and resigned himself

> to his fate, and was not showing any of the self protectiveness and survival instincts which would otherwise be normal under the circumstances.

Dr. Kiev surmised that petitioner "would have exhibited such a level of passivity and willingness to go along with whatever was offered that it amounted to an expression of suicidal intent to end his life." In his opinion, petitioner should have been evaluated to determine his mental competency. (*Id.*, Exh. 19).

The trial court resolved this conflicting evidence in favor of the state. Specifically, the court found that: (1) petitioner was legally competent both on and off his pain medication; (2) he had the capacity to understand the nature and object of the proceedings against him, consult with his attorneys, and assist in the preparation of his defense; and (3) a competency hearing was not required because "there was no 'bona fide doubt' as to [petitioner's] competence to stand trial." (*Id.*, Exh. 34 at ¶¶ 17-21). The judge based his findings on the exhibits submitted by both parties, the chronology of events prepared by the state, and his own recollection. After conducting an independent review of the record, the Texas Court of Criminal Appeals reached the same conclusion and denied habeas relief. *Ex parte Miller-El*, No. 31,001-01.

D. *Discussion*

Petitioner argues that the state habeas proceeding was flawed in four respects: (1) the chronology of events prepared by the state omitted significant information and misrepresented critical facts about his medical condition; (2) the Affidavit of Dr. Steven Bowers was incomplete and unreliable; (3) the trial court ignored his evidence; and (4) the state improperly submitted its proposed findings of fact and conclusions of law to the trial court *ex parte*. As a result of these defects, petitioner contends that he was denied a full and fair opportunity to litigate his competency claim in state court. He therefore seeks a *de novo* review in federal court.

A federal habeas petitioner is entitled to a *de novo* review of a state court's competency determination only "when

he makes a showing by clear and convincing evidence to raise threshold doubt about his competency." *Carter* v. *Johnson*, 131 F.3d 452, 460 (5th Cir. 1997), *cert. denied*, 118 S.Ct. 1567 (1998), *quoting Lokos*, 625 F.2d at 1261. In order to raise such a doubt, a petitioner must present facts sufficient "to positively, unequivocally and clearly generate a real, substantial and legitimate doubt" concerning his mental capacity. *Carter*, 131 F.3d at 460 (citations omitted); *see also United States* v. *Willians*, 819 F.2d 605, 609 (5th Cir. 1987), *cert. denied*, 108 S.Ct. 726 (1988). Petitioner has failed to meet this heavy burden. Nothing in the trial record suggests that he lacked the capacity to understand the proceedings, consult with his lawyers, or assist in the preparation of his defense. To the contrary, defense counsel told the trial judge that petitioner was competent to stand trial and make decisions on his own behalf.[25] Petitioner agreed with that assessment. (SF Trial-III 1198). This fact, standing alone, is persuasive evidence that no Pate violation occurred. *See, e.g. Moody v. Johnson*, 139 F. 3d 477, 482 (5th Cir.), *cert. denied*, 119 S.Ct. 359 (1998); Reese, 600 F.2d at 1092.

Moreover, the trial judge had an opportunity to observe petitioner's demeanor and behavior on a daily basis over an eight-week period. The judge ordered at least two medical evaluations to determine whether petitioner was "able to sit thru court." (Am. Petition, Exh. 27 & 29). None of the doc-

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[25] E. Brice Curmingham, lead trial counsel for petitioner, told the state habeas court that he was unaware of the "full gravity" of his client's *medical* condition. Cunningham testified:

> After learning more about (petitioner's medical condition] at the time of his trial, Trial Counsel would have brought the matter of Mr. Miller-El's medical condition to the court's attention, requested a Hearing to determine this fact, and would have done whatever was possible to assure Mr. Miller-El's receiving the best possible medical attention, either in the Dallas County Jail, Parkland Memorial Hospital, or some other medical facility chat could have dealt with his problem. (Am. Petition, Exh. 28 at 6). Significantly, Cunningham never stated that these medical problems prevented petitioner from cooperating with his lawyers or assisting in the presentation of his defense.

tors who examined petitioner raised any concerns about his mental competency. In addition, petitioner was questioned by his attorneys and the trial judge at various points throughout the proceeding. He answered all questions in a direct and coherent manner.[26] This evidence further undermines petitioner's competency claim.

Petitioner points out that his expert, Dr. An Kiev, thoroughly reviewed all the medical evidence and concluded that he was mentally incompetent to stand trial. The Court acknowledges that the affidavit prepared by Dr. Kiev is more detailed than the affidavit submitted by Dr. Bowers. However, this does not require the trial court to credit his testimony. Although Dr. Kiev opined that petitioner was unable to "participate fully and to the best of his normal abilities in the preparation and presentation of his own defense," the trial judge was entitled to rely on his own observations and the testimony of Dr. Bowers in reaching a different conclusion. *See Carter*, 131 F.3d at 461. Moreover, the Fifth Circuit has twice found similar expert psychiatric testimony insufficient to prove a "real, substantial and legitimate doubt concerning mental competency so as to overcome the presumption of correctness attached to state court findings. *See id.*; *Williams*, 819 F.2d at 608-09. The fact that the trial court did not mention Dr. Kiev's affidavit in its findings does not overcome this presumption. *See Carter*, 131 F.3d at 461.

Nor is the anecdotal evidence cited by petitioner sufficient to rebut the state court funding. Petitioner refers to his repeated requests for pain medication and a comment made by the prosecutor that he was sleeping in court. There is no doubt that petitioner experienced some pain as a result of his physical injuries, pneumonia, and recurrent wound infection. However, there is no objective medical evidence

[26] Petitioner attempts to minimize the significance of his answers by characterizing them as single-word responses. (Am. Petition 238 n.43). However, the record shows that petitioner answered several questions with complete sentences. (SF Voir Dire-III 2779-84; Punishment- 11 17-19).

that this pain or the side effects of his medication prevented petitioner from assisting in the preparation and presentation of his defense. Similarly, the prosecutor's ambiguous remark hardly constitutes clear and convincing evidence of mental in competency. A careful reading of the record discloses that the prosecutor never accused petitioner of sleeping in court. Rather, he asked if a witness could identify petitioner as "the man sitting at the end of the table." Defense counsel apparently misunderstood the question and pointed out that petitioner was "not sleeping." (SF Trial-III 1151) (emphasis added).

Petitioner has failed to show that there are sufficient facts to "positively, unequivocally and clearly generate a real, substantial and legitimate doubt" as to his mental competency at the time of trial. *Moody*, 139 F. 3d at 481; *Carter*, 131 F.3d at 464. Therefore, any defects in the state habeas proceeding were immaterial. This ground for relief is without merit and should be overruled.

VII.

RELIGIOUS AFFILIATION

(Ground No. 6)

Finally, petitioner contends that the prosecutor improperly referred to his religious affiliation and disparaged his beliefs during the punishment phase of the trial.

A. *Applicable Law*

The First Amendment protects the right of an individual to join groups and associate with others holding similar beliefs. *Citizens Against Rent/Control Coalition for Fair Housing v. City of Berkley*, 454 U.S. 290, 294, 102 S.Ct. 434, 436, 70 L.Ed.2d 492 (1981). This precludes the state from introducing evidence of a defendant's "abstract beliefs" during the punishment phase of a criminal trial. *Dawson* v. *Delaware*, 503 U.S.159, 168, 112 S.Ct.1093, 1099, 117 L.Ed.2d 309 (1992). However, such evidence is admissible if it is sufficiently related to issues involved in the case. *Id.*, 112 S.Ct. at 1099; *Fuller* v. *Johnson*, 114 F.3d 491, 498 (5th Cir.), *cert.*

denied, 118 S.Ct. 399 (1997); *Boyle* v. *Johnson*, 93 F.3d 130, 183 (5th Cir. 1996), *cert. denied*, 117 S.Ct. 968 (1997).

B. *Discussion.*

Petitioner belongs to a Muslim sect known as the Moorish Science Temple. Members of this religious group typically wear turbans and other distinctive articles of clothing. Approximately two weeks before the murder, petitioner attended a Moorish Feast at the Holiday Inn South in Irving, Texas. Two hotel employees identified petitioner as one of the participants at this function. Donald Ray Hall, the chief night auditor, testified that petitioner "was dressed in like a Moslim [sic] outfit and he had on a turban." (SF Trial-I 420).

Philip Bond, the hotel manager, testified that several attendees "had turbans on their heads." (*Id.* at 27). Petitioner did not object to this testimony, and tacitly concedes that this evidence was admissible at the guilt innocence phase of the trial to prove his identity.[27] However, petitioner maintains that the prosecutor crossed the line when he questioned Stanley January during the punishment hearing. January testified that he met petitioner as part of a scheme involving illegal drugs. After January described his involvement in this scheme, the prosecutor inquired:

> Q: [BY PROSECUTOR]: Let me ask you: Did Thomas join some sort of political organization?
>
> A: [BY WITNESS]: Muslims, which is the Moorish Science Temple.
>
> Q: Temple of America?
>
> A: Yes.
>
> Q: They are Muslims?
>
> A: Yes.
>
> Q: Did they attempt to get you to join their group?

[27] The trial court found that petitioner's affiliation with the Moorish Science Temple was relevant "to proving [his] identity as the person who committed the robbery/murder and to demonstrate the reliability of eyewitness Donald Hall's identification . . . (Am. Petition, Exh. 34 at ¶ 111).

> A: Well, me and Thomas Miller-El had a fall-out because he said that I wasn't into, you know, the Moorish Science Temple of America, and so by me not being into that, he just trusted me a little bit.

(SF Punishment-II 54-55). The prosecutor made two other references to petitioner's "so-called religious organization" while examining January. (*Id.* at 69, 80). He returned to this issue during closing argument:

> There's not a whole lot you can do for Don Hall, but there is about a million and a half other people that still live here and don't want this community turned into a war zone, where people like Miller-El can indulge in conduct that amounts to paramilitary activities, crime, whatever you want to call it: criminal behavior, whatever; whether it's political, philosophical, *religious or whatever*, if it's motivated by the facts in this case that show you it's uncontrollable and insatiable greed, nonetheless, it leaves in its wake what it left here.

(SF Punishment Arg. 5) (emphasis added).

The state court found that the prosecutor did not criticize or degrade petitioner's religious philosophy, beliefs, or practices. Moreover, the court found that the admission of this evidence did not inflame or prejudice the jury against petitioner on religious grounds. (Am. Petition, Exh. 34 at ¶ 85). Petitioner has failed to rebut these findings by clear and convincing evidence. The passing references to his "so-called religion" and possible religious motivation for the crime are equivocal at best.[28] In addition, the jury was already aware of petitioner's religious affiliation because it was properly introduced into evidence during the guilt-innocence phase of the trial. Petitioner has failed to estab-

[28] Indeed, petitioner acknowledges that "it is impossible to determine what role the Moorish Science Temple evidence played in his death sentence." (Am. Petition at 336).

lish an error of constitutional magnitude that justifies federal habeas relief.

RECOMMENDATION

Petitioner's application for writ of habeas corpus should be denied.

DATED: January 31, 2000.

/s/ Jeff Kaplan

JEFF KAPLAN

UNITED STATES MAGISTRATE JUDGE

IN THE
UNITED STATES DISTRICT COURT
for the NORTHERN DISTRICT of TEXAS,
DALLAS DIVISION

Civil No. 3:96-CV-1992-H

THOMAS JOE MILLER-EL

Petitioner,

v.

GARY JOHNSON, Director, Texas Department of Criminal Justice Institutional Division

Respondent.

MEMORANDUM OPINION AND ORDER

This is a death penalty case.

Before the Court are the Findings and Recommendation of the United States Magistrate Judge, signed January 31, 2000; and Petitioner's Objections, filed February 25, 2000. Magistrate Judge Kaplan recommended that Miller-El's habeas corpus petition be denied. Pursuant to Fed. R. Ci. P. 72(b), this Court has made a *de novo* review of the portions of the Magistrate Judge's disposition objected to by Petitioner. Additionally, the Court heard oral argument from Petitioner and Respondent on April 25, 2000.

Based on the pleadings, evidence, and arguments of counsel, the Court hereby ADOPTS the findings and recommendation of the Magistrate Judge, except as MODIFIED below. Miller-El's petition for a writ of habeas corpus is DENIED.

I. ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT ("AEDPA") STANDARD

At the outset, the Court recognizes the recent changes in habeas jurisprudence. Pursuant to the AEDPA, a federal

court may not grant habeas relief on any claim that was adjudicated on the merits in a state court proceeding unless the petitioner shows that the prior adjudication: (1) resulted in a decision that was "contrary to, or involved an unreasonable application of, clearly established federal law;" or (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

Until very recently, the Fifth Circuit had held that an application of law to facts is not "unreasonable" unless "[the] state court decision is so clearly incorrect that it would not be debatable among reasonable jurists." *Drinkard* v. *Johnson*, 97 F.3 d 751, 769 (5th Cir.1996).

The Supreme Court recently suggested that this standard is erroneous. *See Williams v. Taylor*, _U.S._, 120 S.Ct.1495 (2000). In *Williams*, decided April 18, 2000, the Court criticized the Fifth Circuit's standard:

> The 'all reasonable jurists standard' would tend to mislead federal habeas courts by focusing their attention on a subjective inquiry rather than on an objective one. For example, the Fifth Circuit appears to have applied its 'reasonable jurist' standard in just such a subjective manner. *See Drinkard v. Johnson*, 97 F.3d 751, 769 (1996). . . .

Williams, 120 S.Ct. at 1521-22. It appears that the *Drinkard* opinion has been overturned to the extent it required a subjective inquiry into what is an "unreasonable application" of facts to the law. The Supreme Court went on to ostensibly clarify that, under AEDPA, a state court decision may be incorrect or erroneous application of the law to the facts, but may not be an unreasonable application. *See Williams*, 12 S.Ct. at 1522.

The Magistrate Judge made his recommendation before *Williams* v. *Taylor* was decided, and cited the *Drinkard* "reasonable jurists" standard of review. Therefore, the Court modifies the portions of the Magistrate Judge's recommendation that rely on *Drinkard*. (Magistrate's Findings at 3, 23). However, upon review of the pleadings, the Court finds that the change in the standard review has no determinative effect on the findings of the Magistrate Judge.

II. BATSON[1] AND SWAIN[2] CLAIMS

A. Swain claim

The Court agrees with the Magistrate Judge that Swain does not provide an independent basis for challenging the prosecutor's use of peremptory challenges, and that Petitioner's claim must be analyzed under *Batson*. In each of the cases cited by Petitioner that allow relief under *Swain* (Petition at 179, 184; Objections at 9 n. 4), *Batson* was found inapplicable because it was decided after the defendant's conviction and appeal. Miller-El cites no case that grants Swain relief in which *Batson* was also applied to the prosecutor's use of peremptory challenges. Therefore, the Magistrate Judge's recommendation on the Swain claim is accepted in whole.

B. Batson claim

The principal legal objection to the Magistrate Judge's recommendation on the *Batson* claim is that the Magistrate should have placed more weight on the strong evidence of discrimination in jury selection by Dallas County District Attorneys at the time of Petitioner's trial. Petitioner cites the plurality in *Hernandez v. New York*, 500 U.S. 352 (1991) for the proposition that the trial judge must take all evidence into account in the third step of the Batson inquiry—whether the Defendant has proved purposeful discrimination. However, *Hernandez* also stands for the deference of a federal habeas court to the credibility determination of the state trial judge in determining discriminatory intent. *See Hernandez v. New York*, 500 U.S. 352, 365 (1991). The Magistrate judge properly deferred to the experience of the trial court judge in evaluating the demeanor of each juror and the prosecutor in determining purposeful discrimination.

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[1] *Basson v. Kentucky*, 476 U.S. 79 (1986).

[2] *Swain v. Alabama*, 380 U.S. 202 (1965).

Petitioner's objections to the Magistrate's factual findings are overruled. The Magistrate Judge did not "discount the massive evidence" in support of the first step of the *Batson* inquiry—the prima facie case that the prosecutor excluded jurors solely on the basis of their race. Rather, the Magistrate noted that an inference of purposeful discrimination had already been found by the Court of Criminal Appeals, and determined that further discussion of the evidence in support of the prima facie case was unnecessary.

III. COMPETENCY CLAIMS

Miller-El's first objection is that the Magistrate Judge failed to conduct a *de novo* review of his *Pate*[3] and *Dusky*[4] claims. Miller-El cites no authority for the proposition that a state trial court's adoption of one party's proposed factual findings and legal conclusions corrupts the judicial process so that his claim is not "adjudicated on the merits" under 28 U.S.C. § 2254(d). Equally, there is no authority that the Fifth Circuit has adopted the pre-AEDPA Townsend[5] exceptions to the presumption of correctness in 28 U.S.C. § 2254(4) and 28 U.S.C. § 2254(e)(1).

Miller-El's second objection is that the Magistrate Judge did not expressly address his *Pate* claim. This Court holds that the Magistrate's factual findings show that the *Pate* claim is not meritorious. Objectively considered, the information received by the trial court regarding Miller-El.

El's condition would not have alerted him to the possibility that Petitioner could not rationally aid his attorney in his defense. Both the Petitioner and his attorney, as well as the trial judge, state on the record that Miller-El was competent and aware of the proceedings. The Court finds that Petitioner has not established a *Pate* claim.

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[3] *Pate* v. *Robinson*, 393 U.S. 375 (1966).

[4] *Dusky* v. *United States*, 362 U.S. 402 (1960).

[5] *Townsend* v. *Sain*, 372 U.S. 293 (1963).

Finally, the Court overrules Petitioner's objections to the Magistrate Judge's factual findings, as they are supported by the record in this case.

IV. CHALLENGE FOR CAUSE

The Magistrate Judge held that juror Joyce Willard was not improperly excluded from the jury panel in violation of *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968). Petition's objections point to no demonstrable error of law or fact. Therefore, the Court adopts the Magistrate Judge's findings and recommendation as to Petitioner's fifth ground for relief.

V. IMPROPER MENTION OF RELIGIOUS AFFILIATION

Petitioner claims that references to his membership in the Moorish Science Temple a the guilt-innocence and sentencing phase of this trial were in violation of *Dawson v. Delaware*, 503 U.S.159,165 (1992). While there is no "per se barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment," the government may only use such evidence when it is sufficiently related to the issues involved. *Dawson* v. *Delaware*, 503 U.S. 159,165 (1992).

Petitioner objects that the Magistrate Judge did not explain the significance of the few references to Petitioner's religious affiliation at the punishment stage. The Court finds that, as evidence had been submitted at trial that other members of the Moorish Science Temple were armed and involved in crime, the references to Miller-El's membership in this group were related to the issue of future dangerousness. *See, e.g., Fuller* v. *Johnson*, 114. F.3 d 491, 498 (5th Cir. 1997), *cert denied*, 522 U.S. 963 (1997).

VI. CONCLUSION

Subject to the modifications above, the Court ADOPTS the Magistrate Judge's Findings and Recommendations. Miller-El's Petition for Writ of Habeas Corpus is hereby DENIED.

SO ORDERED

DATED: June 5, 2000

/s/ BAREFOOT SANDERS
BAREFOOT SANDERS
Senior U.S. District Court Judge
Northern District of Texas

United States Court of Appeals,
Fifth Circuit

THOMAS JOE MILLER-EL,
Petitioner-Appellant,

v.

GARY L. JOHNSON, Director, Texas Department of Criminal Justice, Institutional Division,
Respondent-Appellee.

No. 00-10784
Aug. 7, 2001

[261 F.3d 445]

Before JONES, DeMOSS and PARKER, Circuit Judges.

DeMOSS, Circuit Judge:

Petitioner Thomas Joe Miller-El ("Miller-El"), who was convicted of capital murder in Texas state court and who was sentenced to death therefor, and whose petition for habeas corpus relief and request for a Certificate of Appealability ("COA") therefrom were both denied by the federal district court below, now seeks from this Court a COA pursuant to 28 U.S.C. § 2253(c)(2). For all of the reasons set forth below, we DENY the request for a COA.

I. BACKGROUND

In 1985, Miller-El's wife, Dorothy Miller-El, was employed as a night maid for the lobby area of the Holiday Inn South. She arranged for a religious convention for the Moorish Science Temple's Feast on November 8-10, 1985. Her husband was among the attendees. After the convention, Dorothy did not return to work. Shortly before midnight on

November 15, 1985, Dorothy returned to the Holiday Inn claiming that she was there to pick up her paycheck. She was given access to the office area near the vault. During this time period, four hotel employees were working, Doug Walker, Donald Hall, Anthony Motari, and Mohamed Ali Karimijoji. Hall, the chief auditor, was training Mohamed regarding the hotel's daily closing procedures. Hall instructed Mohamed to close out the cash registers, a process which would take one-half hour. Mohamed encountered a woman who claimed that she needed accompanying while she waited for her ride. Mohamed sent her to the front desk area without leaving the locked area he was in.

At the front desk, a man later identified as Miller-El appeared and requested a room from Hall. Witnesses identified Miller-El from having seen him at the Moorish Feast convention the previous week. A younger man, later identified as Kenneth Flowers and dressed in army fatigues and a headset, peered around the corner as Hall was giving Miller-El his room key, and once spotted by Hall, he also approached the counter. Miller-El told Hall that he would be needing two beds. Seconds later, Miller-El and Flowers pulled out weapons. Miller-El brandished a semiautomatic "tech" nine millimeter machine **[448]** gun, with a flash suppressor for night use. Flowers had a .45 caliber hand gun.

Hall complied with Miller-El's instructions to empty the cash drawer and place the money on the counter. Miller-El then ordered Hall to bring any other people in the back out front. Hall instructed Walker to come out. Flowers jumped over the counter and the two men instructed Hall and Walker to lay on the floor. The two men led Hall and Walker to the bellman's closet which they ordered opened. Once the two men removed all of the valuables from the closet and took Walker's and Hall's wallets, Miller-El tied Walker's hands behind his back, tied his legs together, and gagged him with strips of fabric. Flowers did the same to Hall. Walker was laid on his face and Hall was laid on his side.

Miller-El asked Flowers if he was going to "do it" and Flowers responded that he couldn't. Flowers then left.

Miller- El stood at Walker's feet, removed his glasses and then shot Walker in the back two times. Hall closed his eyes after the first shot. He heard two more shots and realized that he had also been wounded. Hall tried to talk to Walker but only heard him choking. When he heard familiar voices outside, Hall screamed for help.

Several days after the robbery-murder, Officer Cagle was on surveillance of an apartment complex believed to be Dorothy Miller-El's. He spotted Dorothy and Flowers. With the assistance of back-up units, he stopped their vehicle and arrested them both. Search warrants were executed for the residence, and "walkie-talkie" headsets were found. When Miller-El was later arrested, found in his possession was an arsenal of weapons including the "tech" nine millimeter murder weapon.

II. PROCEDURAL HISTORY

Miller-El pleaded not guilty to and in March 1986 was tried before a jury on the charge of capital murder during the course of committing a robbery.

On March 24, 1986, the jury returned with a guilty verdict and at the conclusion of the sentencing phase, the same jury answered in the affirmative to the special issues set forth in the Texas Code. Accordingly, the trial court imposed upon Miller-El the sentence of death.

Miller-El's conviction and sentence were automatically appealed to the Texas Court of Criminal Appeals. On December 14, 1992, that court affirmed Miller- El's conviction and sentence in an unpublished opinion. *See Miller-El* v. *State*, No. 69,677 (Tex. Crim. App. 1992) (en banc) (unpublished). And on October 4, 1993, the Supreme Court denied Miller-El's petition for writ of certiorari. *See Miller-El* v. *Texas*, 510 U.S. 831, 114 S.Ct. 100, 126 L.E4.24 67 (1993).

Miller-El then filed an application for state habeas relief. The state trial court judge entered findings of fact and conclusions of law recommending denial of Miller-El's state habeas petition. On June 17, 1996, the Texas Court of Criminal Appeals adopted the trial judge's findings of fact

and conclusions of law and denied Miller-El's application for state habeas corpus relief. *See Ex parte Miller-El*, No. 31,001-01 (Tex.Crim.App.1996) (unpublished).

On June 17, 1997, Miller-El filed his petition for habeas corpus relief pursuant to 28 U.S.C. § 2254 in federal district court. On August 12, 1997, Miller-El filed an amended petition for habeas corpus. Miller-El's petition was referred to a magistrate judge who, on January 31, 2000, issued findings and conclusions, recommending a denial of relief. On June 5, 2000, after receiving objections and conducting **[449]** a hearing on the magistrate judge's report and recommendation, the district court adopted the magistrate's findings and conclusions and denied Miller-El's petition for a writ of habeas corpus. The district court subsequently denied Miller- El's motion to alter or amend the final judgment denying relief on June 21, 2000. Miller-El then filed a notice of appeal in this Court and a motion for a COA in the district court. On August 14, 2000, the district court denied Miller-El's request for a COA on each of the issues raised herein. It is Miller-El's renewed request for a COA that is presently before us.

III. DISCUSSION

Miller-El seeks from this Court a COA on each of the following issues: (1) whether the district court erred in overruling his challenges of improper peremptory juror strikes; (2) whether the state court erred in failing to conduct a sua sponte evidentiary hearing regarding his competency to stand trial and in finding that he was competent to stand trial in 1986; (3) whether the district court likewise erred in failing to conduct a hearing regarding his competency; and (4) whether the district court erred finding that his First and Fourteenth Amendment rights were not violated by admission of evidence, during the punishment phase of his trial, relating to his affiliation with the Moorish Science Temple.

Miller-El's petition for writ of habeas corpus was filed on June 17, 1997, and is thus governed by the provisions of the Antiterrorism and Effective Death Penalty Act ("AEDPA"). *See Lindh* v. *Murphy*, 521 U.S. 320, 117 S.Ct.

2059, 2068, 138 L.Ed.2d 481 1997); *United States v. Carter*, 117 F.3d 262 (5th Cir.1997.) Under AEDPA, before an appeal from the dismissal or denial of a *§ 2254* habeas petition can proceed, the petitioner must first obtain a COA, which will issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The same standards that governed issuance of the pre-AEDPA version of the COA, the certificate of probable cause ("CPC"), apply to requests for a COA. *See Slack* v. *McDaniel*, 529 U.S. 473,120 S.Ct. 1.595, L.Ed.2d .542 2000. A petitioner makes a "substantial showing" when he demonstrates that his petition involves issues which are debatable among jurists of reason, that another court could resolve the issues differently, or that the issues are adequate to deserve encouragement to proceed further. *See id.* at 1603-04.

Additionally, pursuant to § 2254(e)(1), a state court's determination of a factual issue must be presumed correct, and the habeas petitioner bears the burden of rebutting the presumption by clear and convincing evidence. The presumption of correctness is especially strong, where, as here, the trial court and the state habeas court are one and the same. *See Clark* v. *Johnson*, 202 F.3d 760, 764 (5th Cir., cent. denied, 531 U.S. 831, 121 S.Ct. 84, 148 L.Ed.2d 46 (2000).

And while the nature of the penalty in a capital case is an appropriate consideration for determining whether to issue a COA, the severity of the penalty at issue does not, in and of itself, require the issuance of a COA. *See Clark*, 202 F.3d at 764 (citing Lamb, 179 F.3d at 356). However, in capital cases, doubts as to whether a COA should issue must be resolved in favor of the petitioner. *See Lamb*, 179 F.3d at, 356. Cognizant of the foregoing principles, we turn now to consider those issues raised by Miller-El in his request for a COA.

[450] A.

Miller-El first contends that he is entitled to a COA regarding his challenge to the prosecution's alleged improper use of peremptory strikes to exclude African-Americans from his jury. Miller-El argues that the Supreme Court's

decision in *Swain* v. *Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), is still the applicable law regarding challenges to improper peremptory strikes when evidenced by data indicating historic, systematic discrimination against African-Americans. However, during the pendency of Miller-El's direct appeal, the Supreme Court decided *Batson* v. *Kentucky*, 476 U.S. 79,106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), in which it stated that "[t]o the extent that anything in *Swain* v. *Alabama* is contrary to the principles we articulate today, that decision is overruled." *Batson*, 106 S.Ct. at 1725. Yet Miller-El contends that *Batson* only overruled one part of Swain. According to Miller-El, while under Batson, a defendant is no longer required to establish a prima facie case of racial discrimination based upon proof of historical, consistent, and systematic exclusion of African-Americans from juries, if racial discrimination is proffered, nevertheless, under Swain, then *either* the Swain or Batson evidentiary formulations apply. Miller-El argues that the evidentiary formulation of Swain is, thus, applicable to his claim of systematic exclusion. The government contends that the Batson evidentiary formulation overruled the Swain formulation on which Miller-El relies.

Under *Swain*, a defendant was required to show the prosecutor's "systematic use of peremptory challenges against Negroes over a period of time" as a predicate. *See Swain*, 85 S.Ct. at 839. Assuming that a defendant would be able to demonstrate a historical pattern of discrimination continuing unabated to the defendant's trial, the burden would then shift to the prosecutor to rebut the defendant's allegations. *See Alexander* v. *Louisiana*, 405 U.S. 625, 92 S.Ct. 1.221, 1226, 31 L.Ed.2d 536 (1972). To satisfy his burden, the prosecutor could do one of two things. First, the prosecutor could show that the systematic disparity resulted from racially-neutral selection procedures. Second, the prosecutor could "show neutral reasons for the striking of all the blacks in petitioner's trial itself." *Willis* v. *Zant*, 720 F.2d 1212, 1220-21 (11th Cir.1983). However, in any case under *Swain*, we have held that it is not sufficient to prove a *Swain* violation based solely on statistical evidence from

prior trials without some concomitant showing that the intentional and systematic discrimination continued "unabated" through to the petitioner's trial. *See Evans* v. *Cabana*, 821 F.2d 1065, 1068 (5th Cir.1987). Additionally, the prosecutor could rebut the petitioner's showing with a showing of neutral reasons. Miller-El argues that his showing under Swain requires only a showing of historical and systematic discrimination in order to establish a prima facie case.

In *Batson*, the Supreme Court, recognizing the "crippling burden of proof" which *Swain* created, replaced the Swain evidentiary formulation with the new *Batson* standard. That new standard involves the following three steps:

> First: A defendant can establish his prima facie case of purposeful discriminatory petit jury selection solely upon evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. Alternatively, the defendant can make a prima facie case by proving historic, systematic discrimination;
>
> Second: If a defendant makes a prima facie showing, the burden then shifts to the government to provide a race-**[451]** neutral explanation for challenging the excluded jurors;
>
> Third: The trial court must then determine if the defendant has established purposeful discrimination, and the trial court's determination is a finding fact entitled to the applicable level of deference on appellate review.

See Batson, 106 S.Ct. at 1723-24.

Despite Miller-El's contention that the Swain evidentiary framework was untouched by Batson, the Supreme Court has itself explicitly stated "we reject [Swain's] evidentiary formulation as inconsistent with standards that have been developed since *Swain* for assessing a prima facie case under the Equal Protection Clause." *Id.* at 1721; see also *Georgia v. 959 McCollum*, 505 U.S. 42, 112 S.Ct. 2348, 120

L.Ed.2d 33 (1992) (stating that "[i]n *Batson v. Kentucky*, [ ]the Court discarded *Swain's* evidentiary formulation").

With respect to the second step in the *Batson* analysis, the Court stated specifically:

> Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors. Though this requirement imposes a limitation in some cases on the full peremptory character of the historic challenge, we emphasize that the prosecutor's [race-neutral] explanation need not rise to the level justifying exercise of a challenge for cause.

Batson, 106 S.Ct. at 1723. Miller-El suggests that contrary to the above language in step two of the Batson evidentiary framework, the level of explanation required to rebut the prima facie case is governed by the rebuttal stage of the evidentiary formulation of Swain and is a "heavy burden." However, as we have noted, the Supreme Court has explicitly overruled the evidentiary formulation of Swain to the extent that it would contradict any principle, evidentiary or otherwise, announced in *Batson*. See id. at 1725. Thus, to the extent that the two burdens of rebuttal in Swain and Batson are inconsistent, the Supreme Court has mandated that the standard in *Batson* be applied. Here, *Batson* was decided during the pendency of Miller-El's direct appeal, and it is, thus, the applicable standard for analyzing his challenge to the use of peremptory juror strikes. *See Griffith v. Kentucky*, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987) (holding that *Batson* governs claims by defendants whose appeals were pending and non-final at the time *Batson* was decided).

Miller-El contends that the state court's adjudication was an unreasonable application of *Batson* and that the court's findings were also unreasonable in light of his prima facie showing. His primary challenge is to the district court's alleged failure to give proper weight and credit to the evidence which he presented regarding the historical data evidencing exclusion of African-American jurors.

The state court findings in this case on the issue of discriminatory intent, despite Miller-El's protestations to the contrary, are entitled to great deference. *See Hernandez* v. *New York*, 500 U.S. 352, 111 S.Ct. 1859, 1868, 114, L.Ed.2d 395 (1991). As an appellate court reviewing a federal habeas petition, we are required by § 2254(d)(2) to presume the state court findings correct unless we determine that the findings result in a decision which is unreasonable in light of the evidence presented. And the unreasonableness, if any, must be established by clear and convincing evidence. See 28 U.S.C. § 2254(e)(l).

The detailed factual findings made by the state trial court establish that each of the challenged African-American jurors **[452]** was stricken on race-neutral grounds. Miller-El has addressed the peremptory challenge of six of the ten *Batson* jurors in his request for a COA. We have now conducted an independent review of the findings of the state court and of the evidence presented by Miller-El in his application. Suffice it to say, and without commenting on each of the challenged jurors and the reasons proffered for their being excluded, we find that the state court's findings are not unreasonable and that Miller-El has failed to present clear and convincing evidence to the contrary. The findings of the state court that there was no disparate questioning of the Batson jurors and that the prosecution's reasons for striking the jurors was due to their reluctance to assess and/or their reservations concerning the death penalty are fully supported by the record.

Having determined that the state court's adjudication neither resulted in a decision that was unreasonable in light of the evidence presented nor resulted in a decision contrary to clearly established federal law as determined by the Supreme Court, we conclude that this issue would not be debatable among jurists of reason, that courts could not resolve the issues in a different manner, and that the issue does not deserve encouragement to proceed further. Miller-El has thus failed to make a substantial showing of the de-

nial of a constitutional right. Accordingly, we deny Miller-El's request for a COA on this issue.

B.

Miller-El's second issue consists of two parts that revolve around his claim that he was incompetent to stand trial. He first claims that the state trial court erred in failing to provide him with a *sua sponte* evidentiary hearing pursuant to *Pate v. Robinson*, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966). Second, he challenges his conviction as infirm under *Dusky v. United States*, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960), on the basis that he was incompetent, in fact, at the time of his trial. Before analyzing these claims, a brief review of some additional facts is necessary.

Miller-El was tried some eight weeks following his arrest. Incident to his arrest, Miller-El was wounded by a gunshot. During the months following his arrest, Miller-El underwent surgical treatment for his injuries, and he experienced complications such as weight loss. On three separate occasions during his trial, Miller-El was evaluated by a doctor at the direction of the trial court. First, during jury selection, he experienced chest pains, chills, and a fever. He was diagnosed with pneumonia and was treated and discharged the same day. Nine days later, still during jury selection, Miller-El complained of delays in receiving medication. The trial court ordered a second evaluation to determine if Miller-El needed more medication. The doctor determined that he did not. Two days before jury selection concluded, Miller-El was taken to the hospital for treatment of a chest abscess. During his trial, Miller-El complained of pain in his ribs and asked to see a doctor. And finally, on the evening of the day he was found guilty, the trial judge ordered a medical evaluation to determine if Miller-El would be able to sit through court after complaining of nausea and colostomy bag complications. He was kept overnight in the hospital and was released the next day when the punishment phase of his trial began.

Miller-El complains that he was denied a competency hearing at trial and that his due process rights were denied because whenever evidence raises a sufficient doubt about the mental capacity of the **[453]** accused to stand trial, a hearing is required. *See Drope* v. *Missouri*, 420 U.S. 162, 95 S.Ct. 896, 908, ,43 L.Ed.2d 103 (1975); *Pate*, 383 U.S. 375, 86 S.Ct. 836. Miller-El contends that the evidence raised a sufficient doubt as to his competency.

In *Carter* v. *Johnson*, 110 F.3d 1098 (5th Cir. 1997), we explained the procedural inquiries and burdens required for the two competency claims Miller-El asserts. Specifically, we summarized as follows:

The issue of competency may arise in two distinct contexts. *See United States* v. *Williams*, 81.9 F.2d 605, 607-09 (5th Cir. 1987); *Lokos* v. *Capps*, 625 F.2d 1258, 1261-62 (5th Cir. 1980). We must distinguish between them for purposes of the present case.

First, a habeas petitioner may allege that state procedures were inadequate to ensure that he was competent to stand trial. A trial court must conduct an inquiry into the defendant's mental capacity sua sponte if the evidence raises a bona fide doubt as to competency. *Pate* v. *Robinson*, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966). If the trial court receives evidence, viewed objectively, that should raise a reasonable doubt as to competency, yet fails to make further inquiry, this constitutes a denial of a fair trial. *See Lokos*, 625 F.2d at 1261.

If a *Pate* violation is established, the federal habeas court must consider whether a meaningful hearing can be held nunc pro tunc to determine retrospectively the petitioner's competency as of the time of trial. *Id.* at 1262. If so, the petitioner bears the burden of proving his incompetence by a preponderance of the evidence; if not, the habeas writ must issue, subject to retrial at the state's discretion. *Id.* This Pate procedural guarantee is not before us, having been expressly abandoned by Carter on appeal.

Second, a habeas petitioner may collaterally attack his state conviction by directly alleging incompetence at the

time of trial, thereby claiming a violation of the substantive right not to be tried and convicted while incompetent, rather than of the procedural guarantee of a competency hearing in the event that a bona fide doubt arises at trial as to competency:

> It is always open for the defendant to later assert his actual incompetence at trial in a subsequent collateral proceeding, but the substantive claim should not be confused with a defendant's procedural rights under *Pate* to a hearing whenever a bona fide doubt as to competence surfaces at trial.

Carter v. *Johnson*, 131 F.3d 452, 458 n. 10 (5th Cir. 1997).

First, with respect to whether Miller-El was entitled to a hearing, the relevant inquiry is whether the district court received information "which, if objectively considered, should reasonably have raised a doubt about the defendant's competency and alerted [it] to the possibility that the defendant could neither understand the proceedings or appreciate their significance, nor rationally aid his attorney in his defense." *Lokos*, 625 F.2d at 1261. In this case, the trial court specifically found that Miller-El was competent to stand trial, both at the trial and again on state habeas review. Specifically the court found:

> (1) petitioner was legally competent both on and off his pain medication; (2) he had the capacity to understand the nature and object of the proceedings against him, consult with his attorneys, and assist in the preparation of his defense; and (3) a competency hearing **[454]** was not required because "there was no 'bona fide doubt' as to [petitioner's] competence to stand trial."

Our independent review of the record evidence convinces us that the district court's finding that Miller-El was not entitled to a hearing is not unreasonable, and Miller-El has failed to present clear and convincing evidence to the contrary. With respect to whether Miller-El was, in fact, incompetent, we find that the district court's conclusion that he was not, is reasonable, and likewise, we find that the state

court's decision does not represent an unreasonable application of federal law. Thus, we conclude that Miller-El has failed to make a substantial showing of the denial of a constitutional right, and we deny Miller-El's request for a COA on this issue.

C.

In his third issue, Miller-El claims that he is entitled to a COA because the federal district court erred in refusing to conduct an evidentiary hearing nunc pro tune to determine whether he was competent to stand trial in 1986. Having concluded above that Miller-El has failed to establish a bona fide doubt as to his competency at trial under *Pate* and that the state court's determination of competence was reasonable, we need not readdress this issue.

A state court's competency determination is a finding of fact entitled to a presumption of correctness under § 2254(d)(2). And we have stated that "[b]efore the federal district court has a duty to investigate a habeas petitioner's claim of incompetency, the petitioner must show that there are sufficient facts to 'positively, unequivocally and clearly generate a real, substantial and legitimate doubt as to the mental capacity of the petitioner to meaningfully participate and cooperate with counsel during trial.' " *Moody v. Johnson*, 139 F.3d 477, 481 (5th Cir. 1998) (quoting *Washington* v. *Johnson*, 90 F.3d 945, 950 (5th Cir. 1996)). Under Section 2254(e)(1), a habeas petitioner is entitled to a nunc pro tunc evidentiary hearing for the purpose of proving that he was incompetent at the time he stood trial only when he "makes a showing by clear and convincing evidence to raise a threshold doubt about his competency." *Lokos*, 625 F.2d at 1261. This threshold burden is "extremely heavy," *Johnson* v. *Estelle*, 704 F.2d 232, 238 (5th Cir. 1983), and requires that a petitioner present facts sufficient to "positively, unequivocally, and clearly generate a real, substantial and legitimate doubt" concerning his mental competence, *id.* at 238. *See also Jackson* v. *Anderson*, 112 F.3d 823 (5th Cir. 1997) (noting that § 2254(e)(1) places a heavier burden on petitioners seeking to rebut state court fact findings).

Miller-El suggests that he was entitled to an evidentiary hearing in the federal district court because he was not given a live hearing in the state court. The state habeas court instead based its decisions upon the parties' supplemental briefing and expert affidavits, i.e., Miller-El received only a paper hearing. We find Miller-El's suggestion untenable, especially where, as here, the trial judge and the state habeas judge were the same. *See Clark* v. *Johnson*, 202 F.3d at 766 ("we have repeatedly found that a paper hearing is sufficient to afford a petitioner a full and fair hearing on the factual issues underlying the petitioner's claims, especially where . . . the trial court and the state habeas court were one in the same.").

We conclude that Miller-El has failed to make a substantial showing of the denial of a constitutional right on this issue in that he has failed to rebut the presumptive **[455]** correctness of the state habeas and district court findings that he was competent to stand trial in 1986 and that he was not entitled to a nunc pro tunc hearing to determine competency. Accordingly, we deny Miller-El's request for a COA on this issue.

D.

In his fourth and final issue, Miller-El argues that he is entitled to a COA on his claim that his First and Fourteenth Amendment rights were violated by the admission of evidence, during the punishment phase of his trial, relating to his affiliation with the Moorish Science Temple faith in violation of *Dawson* v. *Delaware*, 503 U.S. 159, 112 S.Ct. 1093, 117 L.Ed.2d 309 (1992). In *Dawson*, while the Supreme Court held that where religious affiliation unrelated to any issue in the case may be impermissible, there is no "per se" barrier to the admission of evidence which concerns a defendant's beliefs and associations at sentencing. *Dawson*, 112 S.Ct. at 1097. The Court noted that "[i]n many cases . . . associational evidence might serve a legitimate purpose in showing that a defendant represents a future danger to society." *Id.* at 166, 112 S.Ct. 1093. We have, likewise, held that if the evidence regarding a defendant's affiliations or personal beliefs is sufficiently related to the issues involved, there is no constitutional violation. *See Boyle* v. *Johnson*, 93 F.3d 180, 183-84 (5th Cir. 1996).

Here the state habeas court concluded that Miller-El's association with the Moorish Science Temple was inextricably intertwined with his conviction and sentence. Evidence was entered in the guilt phase regarding his membership as part of testimony regarding witnesses' ability to identify him through his participation in the Moorish Temple Feast at the murder scene the week before the robbery-murder. Thus, introduction of this evidence during the guilt phase was relevant to other matters.

The additional references to his membership during the punishment phase of his trial, as the state court found, were appropriate as they related to his involvement with other group members who were heavily armed and who assisted in the commission of Miller-El's offense of conviction. The government's characterization of Miller-El as belonging to a heavily armed paramilitary group was supported by the evidence and was probative as an indicator of future dangerousness.

Having conducted an independent review, we conclude simply that the state court's determination that Miller-El's due process rights were not violated by the prosecution's reference to his membership in the Moorish Science Temple faith was consistent with and was not contrary to the Supreme Court's applicable holding in *Dawson*. Furthermore, we conclude that the state court's adjudication of this claim was reasonable, and therefore, we deny Miller-El's request for a COA on this issue.

I. CONCLUSION

Having carefully reviewed the record, we conclude that Miller-El has failed to make a substantial showing of the denial of a constitutional right with respect to any of the issues raised in his request for COA, and accordingly, we DENY his request for COA on all issues raised therein.

IN THE COURT OF CRIMINAL APPEALS,
SITTING AT AUSTIN, TEXAS

COURT CRIMINAL APP. NO. 69,677
TRIAL COURT NO. F85-78668-NL

THOMAS JOE MILLER-EL,
Appellant,

versus

THE STATE OF TEXAS,
Appellee.

[STAMP: FILED IN
Court of Criminal Appeals
APR 27 1987
Thomas Lowe, Clerk]

ORAL ARGUMENT REQUESTED

APPEALED FROM
CRIMINAL DISTRICT COURT NUMBER 5
OF DALLAS COUNTY, TEXAS

BRIEF FOR THE APPELLANT

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* * * *

[29] ARGUMENT AND AUTHORITIES

Article 35.16(c) of the Texas Code Of Criminal Procedure, provides that "A challenge for cause may be made by the defense for any of the following reasons:

> "2. That he has a bias or prejudice against any of the law applicable to the case upon which the defense is entitled to rely, either as a defense to some phase of the offense for which the defendant is being prosecuted or as a mitigation thereof or of the punishment therefor."

The Court Of Criminal Appeals has held that "... A defendant is entitled to have jurors who believe in the full range of punishment. *WOODKINS v. STATE*, 542 S.W.2d 855 (Tex.Cr.App.1976); Acc., *CUEVAS v. STATE*, 575 S.W.2d 543 (Tex.Cr.Appl.1978); *SMITH v. STATE*, 573 S.W.2d 763 (Tex.Cr.App.1977)." *PIERCE v. STATE*, 604 S.W.2d 185, 187 (1980). The law is clear that both the Appellant and the State have the right to have jurors who believe in the full range of punishment. *See HUFFMAN v. STATE*, 450 S.W.2d 858. In the instant case, Appellant contends that the Trial Court committed Reversible Error in Overruling his challenge for cause of venireman Nos. 6, DARYL L. WEIGANT; 21, SANDRA L. JENKINS; GWENDOLYN M. SMALE; 79, LOUIS G. WOLTERS; 82, CHERYL ANN DAVIS; 85, GARY B. SPENCE; 103, RUSSELL L. JONES; 107, MAX WAYNE O'DELL; and 108, SANDRA RAE HEARNE.

The overall picture presented by the voir dire examination each of the above named veniremen, who were challenged for cause by the Appellant and said challenges were overruled by the court were that each was a person holding strong convictions. Appellant was required to use a peremptory strike to excuse each of said veniremen except SANDRA RAE HEARNE. The **[30]** veniremen hereinabove referred to each expressed long held feelings with respect to the minimum range of punishment, in a murder case, feelings concerning the death penalty, that the fact that a person was in court, meant that he must have done something, otherwise he would not be there, prejudice against the testimony of psychiatrist, and giving more credibility to the testimony of a police office deprived this Appellant of those types of veniremen who could be impartial in this case. As a result of what each of the veniremen, hereinabove mentioned, stated, Appellant was forced to use peremptory chal-

lenges on each of said veniremen except 108, SANDRA RAE HEARNE. That the Appellant was wrongfully deprived of nine peremptory challenges by being forced to use these nine challenges on veniremen who were shown to be subject to a challenge for cause. That Appellant exhausted his peremptory challenges and thereafter venireman 108, SANDRA RAE HEARNE, who was objectionable to the Appellant, was seated as a juror. It was not necessary for Appellant to show in what manner MS. HEARNE was objectionable to him, nor to show that such juror was an unfair or partial juror, even though the record is clear from her testimony that she was obviously disqualified to sit as a juror in this case based upon her response to questions by counsel for Appellant. *WOLFE v. STATE*, 178 S.W.2d 274, 281.

Appellant alleges that the record in this case shows that each venireman complained of was challengable for cause; that **[31]** the overruling of such challenges and the use of peremptory challenges to excuse said veniremen deprived him of nine (9) peremptory challenges; and if all or some of the challenges for cause had been sustained, appellant would have had one or more peremptory challenges left and he would have used one to strike MS. HEARNE, for the reasons set out hereinabove. By no stretch of the imagination could MS. HEARNE be considered qualified as a fair juror in this case. That her background, associates, prejudices and opinions were of such a nature that a bias juror was seated on Appellant's jury. One who should have been struck without a challenge from Appellant but by the court, after examination by counsel for the parties. Appellant was entitled to jurors who had no bias or prejudice against any of the law applicable to the case upon which the defense was entitled to rely, either as a defense to some phase of the offense for which the Appellant is being prosecuted or a mitigation thereof or of the punishment therefor. Article 35.16, Texas Code of Criminal Procedure. *SHAVER v. STATE*, 280 S.W.2d 740; *HERNANDEZ v. STATE*, 563 S.W.2d 947 (Tex.Cr.App.1978). *See also PEYTON v. STATE*, 572 S.W.2d 677 (Tex.Cr.App.1978); *PIERCE v. STATE*, 604 S.W.2d 185 (Tex.Cr.App.1980). The nine (9) veniremen

struck and MS. HEARNE who was seated over Appellant's objections, because he had exhausted his peremptory challenges and the court's refusal to grant any additional challenges to Appellant, were all clearly disqualified based upon Article 35.16, Texas Code Of **[32]** Criminal Procedure, and appropriate case law of this court.

This court has held that "When a prospective juror is shown to be biased as a matter of law, he *must* be excused when challenged, even if he states that he can set his bias aside and provide a fair trial." *ANDERSON v. STATE*, 633 S.W.2d 851, 853-854 (Tex.Cr.App.1982).

Appellant was entitled, as a matter of law, to have the veniremen who were obviously disqualified by virtue of their examination by counsel, excluded from the jury upon a challenge for cause. Appellant made the appropriate challenges in the instant case, and they were denied by the court. Appellant was compelled to use peremptory challenges to excuse nine (9) of the ten (10) veniremen complained of hereinabove from sitting as jurors in this case. The tenth, MS. HEARNE, could not be excluded for the reasons hereinabove set out. This constituted reversible error by the trial court. *CHAMBERS v. STATE*, 568 S.W.2d 313 (Tex.Cr.App.); BODDE v. STATE, 568 S.W.2d 344 (Tex.Cr.App.); *JORDAN v. STATE*, 635 S.W.2d 522 (Tex.Cr.App.1982).

With respect to each of the veniremen set out above, except MS. HEARNE, Appellant submitted such juror for cause and the court overruled and declined to excuse such jurors for cause. Appellant was then required to use a peremptory challenge. With respect to MS. HEARNE, Appellant had exhausted his peremptory challenges, and after examination of MS. HEARNE by counsel, **[33]** submitted here for cause which was denied by the court. Appellant then advised the court that MS. HEARNE was objectionable to the Appellant and again renewed his request for additional peremptory challenges because of the court having failed to exclude the other veniremen mentioned hereinabove except MS. HEARNE. Therefore, Appellant preserved all error

pertaining to all of the veniremen mentioned hereinabove, as required by this court. *STEVENS V. STATE*, 671 S.W.2d 517 (Tex. Cr. App. 1984); *PHILLIPS V. STATE*, 701 S.W.2d 875 (Tex. Cr. App. 1985).

Because of the error complained of hereinabove, Appellant is entitled to have this cause reversed and remanded to the trial court below for a new trial or for the alternate for dismissal.

ASSIGNMENT OF ERROR NO. 18

The Trial Court materially erred in refusing to grant TIJUANA BEY BONNER transactional immunity after she invoked the Fifth Amendment to the United States Constitution.

ASSIGNMENT OF ERROR NO. 19

The Trial Court materially erred in refusing to grant SONNY KENNARD FLOWERS transactional immunity after he invoked the Fifth Amendment to the United States Constitution.

STATEMENTS AND REMARKS

The witness TIJUANA BEY BONNER was called as a witness by

* * * *

IN THE COURT OF CRIMINAL APPEALS,
SITTING AT AUSTIN, TEXAS

COURT OF APPEALS NO. 69,677
TRIAL COURT NO. F85-78668-NL

THOMAS JOE MILLER-EL,
Appellant,

versus

THE STATE OF TEXAS,
Appellee.

[STAMP: FILED IN
Court of Criminal Appeals
NOV 30 1992
Thomas Lowe, Clerk]

MOTION FOR LEAVE TO
FILE AND MOTION FOR REHEARING

TO THE HONORABLE JUDGES OF SAID COURT:

* * * *

[13] the ten (10) Afro-American venirepersons excused by a Peremptory Challenge of the State, Appellant was denied a fair and impartial Trial composed of a Jury which was not touched or contaminated with the racial use of Peremptory Challenges by the State.

II.

The Court erred, in its Per Curiam Opinion, in holding that ". . .As to each respective claim, we find credible assertion of willingness to obey instructions of the Court with respect to all matters of law affecting Jury deliberations and to

consider the full range of punishment applicable to every potential offense in the case. *SEE APPENDIX B.* Consequently, Appellant has not persuaded us that the Trial Judge erred by rejecting his challenge to any specific veniremember. . .". *Miller-El, II, supra.* The Trial Court then Overruled Appellant's Points of Error Nos. 8 through 16.

ARGUMENT AND AUTHORITIES

Appellant contends that as a matter of law he was entitled to have Venirepersons WEIGANT, JENKINS, SMALE, NICKS, WALTERS, DAVIS, SPENCE, JONES, BODALE, and HEARN, each of whom were obviously disqualified by virtue of their examination by Appellant's Counsel, excluded upon Appellant's Challenge for Cause. Appellant seriously questions whether or not the "entire examination of the Venirepersons complained of" was made in rendering its decision **[14]** with respect to Points of Error Nos. 8 through 16, that is, whether or not the Venirepersons, ***"in a proper case could 'and would' assess the minimum sentence of five years for the lesser and included offense of Murder."***

Appellant made the appropriate Challenge for Cause with respect to the Venirepersons complained of and said Challenges were denied by the Trial Court, in each instance, and Appellant was required to exercise and use a Peremptory Challenge to excuse these ten (10) Venirepersons from being seated as jurors in this case. Appellant claims that besides the authorities set out in his original Brief, that this constitutes Reversible Error for the reasons set out in the following authorities. *Chambers v. State*, 568 S.W.2d 313 (Tex.Cr.App. 1978; *Boddee v. State*, 568 S.W.2d 344 (Tex.Cr.App. 1978); *Jordan v. State*, 635 S.W.2d 522 (Tex.Cr.App. 1982). Appellant contends, based upon the entire Record and the examinations of the Venirepersons complained of by Appellant, that these persons were Venirepersons who would ultimately, if seated on the Jury, be guided by his/her personal beliefs rather than the law, and were, therefore, not qualified to sit as jurors in this case because of their feelings with respect to the minimum range of punishment. Appellant therefore alleges that the Trial Court, and this Court in affirming the Judgment of the Trial Court, materially erred in denying Appellant's Challenges for Cause to each of these Venirepersons. *See, Landry v. State*, 706 S.W.2d 105 (Tex.Cr.App. 1985).

[15] This is especially true with respect to Venireman SPENCE who testified that he presumed the Appellant had done something wrong by virtue of his being tried for Capital Murder. He never changed this statement. Thus, Appellant submits, that this Venireperson did not have an open mind, both as to the presumption of Appellant's innocence, and the minimum range of punishment. The Challenge for Cause should have been granted.

Appellant alleges that harm was created by the Trial Court's refusal to grant the Challenges for Cause to the ten (10) Venirepersons hereinabove complained of, and that in each instant, a Peremptory Challenge had to be used to exclude said person from being seated on the Jury in Appellant's case. *East v. State*, 702 S.W.2d 606 (Tex.Cr.App. 1985); *Bell v. State*, 724 S.W.2d 708, 795 (Tex.Cr.App. 1986). Appellant in this case exhausted all fifteen (15) of its Peremptory Challenges, ten (10) of said Peremptory Challenges being used to exclude Venirepersons WEIGANT, JENKINS, SMALE, NICKS, WALTERS, DAVIS, SPENCE, JONES, BODELL, and HEARN as jurors in this case. If the Challenges for Cause had been granted, as the Record clearly reflect they should have been, then Appellant would have had ten (10) Peremptory Challenges that he could have subsequently used to exclude other Venirepersons who were objectionable to Appellant. This is particularly true of Venirewoman No. 108, SANDRA R. HEARN. If ever -if ever - there was a Venireperson that should have been excluded for cause from the Jury in this case, or any capital Murder Jury, it was **[16]** Venirewoman HEARN. It is hoped that the Lord will save us from future jurors with her type of thinking and beliefs, who was seated as the twelfth person on the Jury in this case, over Appellant's Objections and Challenges for Cause. Appellant did not have any remaining Per-

emptory Challenges to use to exclude Venirewoman No. 108, SANDRA R. HEARN, who was truly an objectionable and unacceptable juror, from becoming the twelfth juror in Appellant's case. In fact, Appellant probably would have tried it with eleven, without MS. HEARN. Appellant therefore strongly asserts that severe and devastating harm can be clearly shown and established and is evidenced in the Record in this case in denying Appellant's Challenge for Cause to SANDRA HEARN. *See, Hernandez v. State*, 563 S.W.2d 947, 948 (Tex.Cr.App. 1978); *Wolfe v. State*, 147 Tex.Cr.R. 62, 178 S.W.2d 274, 281 (1944); *Salazar v. State*, 149 Tex.Cr.App. 260, 193 S.W.2d 211; *Bailess v. State*, 166 Tex.Cr.R. 478, 316 S.W.2d 743; *Sippert v. State*, Tex.Cr.App. 505 S.W.2d 866; *Cuevas v. State*, 575 S.W.2d 543 (Tex.Cr.App. 1978); *Smith v. State*, 573 S.W.2d 763 (Tex.Cr.App. 1977); *Pierce v. State*, 604 S.W.2d 185-187 (1980); *Williams v. State*, 622 S.W.2d 116 (Tex.Cr.App. 1981). That the Error complained of hereinabove, with respect to Venirewoman SANDRA R. HEARN, was compounded by the Trial Judge's refusal to grant Appellant additional Peremptory Challenges for the reasons stated in its Motion and because of the use of ten Peremptory Challenges against Venirepersons that should have been dismissed for cause. Appellant therefore avers that Reversible [17] Error was committed by the Trial Court in Overruling Appellant's Challenges for Cause and that harm was shown in the Instant Case and that this Court erred in affirming the Judgment of Conviction herein.

Appellant alleges that when examining the entire Record, it becomes abundantly clear that the Challenges for Cause complained of and denied by the Trial Court, constituted Reversible Error and Points of Error Nos. 8 through 16 should have been sustained. Appellant would respectfully request the Court to reexamine its remarks with respect to these Points of Error, and having done so, Reverse its prior Opinion thereto. If ever a Jury was stacked against an Appellant, it occurred in this case.

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III.

The Court, in its Per Curiam Opinion, erred in Overruling Appellant's 17th Point of Error that he ". . .did not demonstrate in Part II, ante, that he was forced to spend peremptory challenges against veniremembers who should have been removed for cause at his request, failure to allow him more Peremptory Challenges was not improper.

ARGUMENT AND AUTHORITIES

Appellant realizes that the Code of Criminal Procedure provides 15 strikes for each side in a Capital Murder case. However, in the Instant Case, Appellant complained of ten (10)

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NEWS

RACE BIAS PERVADES JURY SELECTION

Prosecutors routinely bar blacks, study finds Series: DISCRIMINATION IN JURIES

Steve McGonigle, Ed Timms
1986, The Dallas Morning News

Dallas County prosecutors routinely have excluded nine out of 10 blacks qualified to serve as jurors, perpetuating a decades-old pattern of racial discrimination on felony juries.

For four out of five black defendants, the selection process means that the constitutionally guaranteed impartial jury of their peers will be an all-white jury.

An eight-month investigation by The Dallas Morning News shows that prosecutors routinely manipulate the racial composition of juries through their use of peremptory challenges—legal objections that allow lawyers to dismiss prospective jurors without explanation.

District Attorney Henry Wade, however, denied that his assistants exclude prospective jurors solely because of race, although he acknowledged that race may be a factor in whom they dismiss. Prosecutors, Wade said, act within the spirit of the adversary legal system to exclude anyone if they believe it will give their client—the people of Dallas County—"a fair trial."

While blacks comprise 18 percent of Dallas County's population, The News' analysis of 100 randomly selected felony trials found that fewer than 4 percent of jurors were black. In fact, the chance of a qualified black serving on a jury was 1-in-10, compared to a 1-in-2 chance for a qualified white.

Of those blacks struck from juries by peremptory challenges, the study found, 92 percent were barred by prosecutors. Blacks were excluded from juries at almost five times

the rate of Anglo jury candidates and twice as often as Hispanic candidates.

Several legal experts characterized the findings as showing that Dallas County prosecutors are engaging in a "systematic exclusion" of black jury candidates that violates not only the defendants' right to a fair trial, but also the right of black citizens to participate equally in administering justice.

Defense attorneys contend prosecutors, while picking what they perceive will be the most conviction-prone juries, are ignoring their legal duty to uphold justice.

"I think that the black population, being a significant portion of Dallas County, is being totally discriminated against, and if I were a black person I'd be up in arms about it," said Dallas defense lawyer Kerry FitzGerald, head of the Texas Criminal Defense Lawyers Project Wade, Dallas County's chief prosecutor for 35 years, said that in some cases, he believes blacks may be "more likely" to convict defendants than those who actually are selected for juries.

"I'm frankly trying to get more on (juries)," Wade said of blacks. "We don't take them on just to balance the jury."

City Council member Al Lipscomb, an outspoken critic of jury selection in Dallas County, charged that prosecutors are using "racist tactics" that alienate blacks from the judicial system.

"The criminal justice system itself should be indicted here in Dallas for tampering with the law, for tampering with the rights of citizens," said Lipscomb, one of two black members on the City Council.

The U.S. Supreme Court has ruled that systematic exclusion of an identifiable group of potential jurors is unconstitutional. It has reversed criminal convictions on such grounds—including three cases from Dallas County in the 1940s in which racial bias in the selection of grand jurors was alleged.

FitzGerald contended that "stacking" the racial makeup of juries denies defendants of all races their constitutional

right to have their fates determined by a representative cross section of the community.

Increasingly, similar arguments are being voiced throughout the nation. Supreme courts in four states and three of the 11 federal circuit courts of appeal, for example, have modified peremptory challenges because of concern about their racially biased use by prosecutors.

In Texas, prosecutors and defense lawyers each have 10 peremptory challenges in non-capital felony trials. The peremptory challenge allows lawyers to cull prospective jurors without having to give cause.

The U.S. Supreme Court is studying the "cross section argument"—that defendants have a right to a trial by a representative section of the community—in a Kentucky case to decide whether to modify a controversial 1965 decision that permits racially based peremptory challenges in individual cases.

The court stated in *Swain* v. *Alabama* that a prosecutor's use of his peremptory challenges is not unconstitutional unless he uses them "in case after case" to exclude blacks for no reason related to any trial strategy.

Critics of Swain contend that it gives prosecutors free rein to exclude blacks and imposes an impossible burden on defendants to prove unconstitutional exclusion because of the lack of records identifying potential jurors by race.

Arch McColl, president of the Dallas County Criminal Bar Association, said The News' study exemplifies the type of race discrimination by state action that the high court consistently has condemned. It also demonstrates, McColl said, that prosecutors still adhere to jury selection guidelines suggested in a controversial 1969 paper.

The paper, written by then-Assistant District Attorney Jon Sparling, noted that minorities "almost always empathize with the accused" and therefore do not make good jurors for the prosecution.

"You are not looking for a fair juror," Sparling advised in the paper, which later was made part of a manual for

Texas prosecutors, "but rather a strong, biased and sometimes hypocritical individual who believes that defendants are different from them in kind rather than degree."

Sparling, now a candidate for the Republican nomination for district attorney, said he was repeating "the conventional wisdom of the time" and that he no longer believes the guidelines are valid.

"I don't see that there is a good reason, and I don't think there's ever been a good reason, to systematically exclude blacks" Sparling said.

State District Judge Larry Baraka, a former prosecutor and the county's first black felony court judge, said The News' findings also demonstrate the failure of judges and defense lawyers to stop the exclusion of qualified blacks from jury service.

"I'm in shock," Baraka said. "I thought things had gotten a lot better, but apparently they haven't."

Wade said his assistants are trained to use their peremptory challenges to dismiss potential jurors they believe will empathize with the defendant. He said, however, that not all his assistants may use their peremptory challenges intelligently.

"You're trying to get either a completely unbiased juror or one that may be biased in favor of the state," said Wade, who is not seeking re-election. "And I suspect a lot of those (blacks) being cut would probably be better jurors than the ones they end up with."

Wade suggested that the high rate of black exclusion revealed in The News' study might stem from a disproportionately large number of blacks who express doubt about assessing maximum punishments or who have personal knowledge of criminal cases.

Wade said he was not convinced by The News' findings that his assistants engage in an illegal, systematic exclusion of blacks. "It indicates, maybe, that," he said.

The News' study is based on a computer analysis of Dallas County court records from 100 felony jury trials con-

ducted during 1983 and 1984. The trials were selected at random from among the 1,036 trials held during that period.

The study examined records on 4,434 prospective jurors to determine the racial composition of juries, as well as the race of persons excluded from jury service by judges, prosecutors and defense lawyers.

Among the major findings of the study are:

- Juries in 72 of the 100 trials had no blacks. Of the 28 juries with black members, eight sat in judgment of black defendants while 20 decided the fate of Anglo and Hispanic defendants.
- Only two of 54 black male defendants included in the study were tried by juries that had black males. None of the seven male Hispanic defendants had a male Hispanic juror. All 38 Anglo defendants had a majority of Anglos on their juries.
- Of those blacks eliminated from jury service by peremptory challenges, 92 percent were struck by prosecutors. Four percent were excluded by defense lawyers, and 4 percent were dismissed by both sides. (Neither side knows the other's challenges until the judge receives them at the end of the preliminary examination.)
- Forty-seven Hispanics and 46 blacks served on juries, although the number of blacks summoned for jury duty was five times greater than the number of Hispanics.
- The percentage of blacks disqualified from jury service by judges was 1 1/2 times the percentage of disqualified Anglo or Hispanic jury candidates. However, blacks were excluded by prosecutors at almost five times the rate of Anglo jury candidates and twice as often as Hispanic candidates.

Prosecutors maintain that blacks themselves are partly responsible for their under representation on felony juries because many disqualify themselves by saying they cannot

judge others or consider a life sentence in cases where state law provides such punishment upon conviction.

Under Texas law, prospective jurors who say they cannot follow the law because of personal convictions or bias are disqualified for "cause."

After those disqualified are dismissed by the judge and both sides exercise their peremptory challenges, the first 12 people who remain are chosen to sit on the jury.

Peremptory challenges, in varying forms, have existed since the 13th century in English law. Historically, they were granted only to the defense in a criminal case. It has been in the last century in the United States that prosecutors were granted the right to exercise such challenges.

Defense lawyers argue that the use of peremptory challenges by Dallas County prosecutors to exclude blacks from juries stems from a racial stereotype that blacks are less inclined to convict and assess harsh penalties.

The stereotype has been passed from generation to generation of prosecutors and is particularly acute in Wade's office, defense lawyers say, because of its heavy emphasis on conviction rates as the means for earning promotion.

"You don't get hired unless you can play that game, and you certainly don't progress," said Vincent Perini, president of the Dallas Bar Association.

"What they are, really, is a bunch of SMU frat rats who are, you know, putting in a little postgraduate work down there kicking nigger ass before going on to the real world, the respectable world, the Dallas Country Club and the civil law firm," Perini said.

Norman Kinne, one of Wade's top three felony prosecutors and a member of his staff for 14 years, strongly denied Perini's characterization of the district attorney's staff.

"I can't believe the elected president of the Dallas Bar Association, in one fell swoop, manages to insult Southern Methodist University, fraternities, the black race, the Dallas Country Club and all civil law firms," Kinne said.

"However, we have tried over the years to provide, under Mr. Wade's guidance, professional prosecution of which all citizens may be proud. The record of this office and the quality of life in Dallas speaks for itself."

Baraka said stereotyping blacks as being less inclined to convict and assess tough sentences is "absurd."

"Skin color has nothing to do with the process of your damn brain," he said.

Defense lawyers say the practice of excluding blacks has diminished as the number of black prosecutors in Wade's office has increased, but they say that even black prosecutors succumb to the pressure to win at all costs. Eight of the 42 felony court prosecutors on Wade's staff are black.

Black lawyers, in particular, maintain that blacks, more than whites, have more reason to dislike criminals because of the higher crime rate in the black community.

"People, be they black, white or brown, are tired of crime; they're just tired of it," said Royce West, a black former prosecutor and a Democratic candidate for district attorney. "I think that when blacks and browns are systematically included on juries that they will give stiffer punishments."

Added defense lawyer Frank Hernandez: "Blacks, Mexican-Americans, women are just as tough, if not tougher, on a defendant who meets their minority status because they look upon that person with some sort of anger sometimes: "You are causing our whole group to be looked upon in this (bad) way."

"Just because you're black doesn't mean that if the defendant is black he gets away," said Hernandez. "Blacks don't like to be shot at in 7-Elevens any more than anybody else. Nor do Hispanics like to be burglarized."

The practice of prosecutors excluding blacks is so commonplace that defense lawyers say they routinely incorporate it into their trial strategy, rarely dismissing even prosecution-minded blacks, anticipating that prosecutors will use one of their peremptory challenges to do the job for them.

In The News' study, only 3.3 percent of the peremptory challenges exercised by defense lawyers were against blacks; 2.5 percent were against Hispanics. Ninety-four percent of the defense strikes were exercised against Anglos.

Dallas County Public Defender Ralph Taite said he routinely warns black clients that they will likely face "a white jury composed of housewives, sometimes rednecks, a lot of middle-class people who come from the suburbs, who have very little contact with them."

"There's not going to be anybody on that panel who's going to be able to say, "Yeah, that's the way it is over in South Oak Cliff, or South Dallas, or West Dallas," Taite said.

The only time blacks get on a jury, defense lawyers contend, is when there are too many white non-conformists who appear to prosecutors to be even worse risks.

"You get about 12 hippies and 14 painted-up women and a bunch of cab drivers and bartenders, and they (prosecutors) will be inclined to take chamber of commerce-type blacks—you know, business-looking, good background with jobs," said veteran defense lawyer Charles Tessmer.

Defense attorney Richard Aguire said The News' findings that Hispanics serve on juries in a greater proportion than blacks confirms observations that prosecutors prefer Hispanics over black jurors.

The reason, Aguire said, is that prosecutors believe Hispanics will follow the lead of the Anglo majority on a jury. According to defense lawyers, prosecutors also believe that Hispanics will not favor black defendants because of what prosecutors perceive as historical antipathy.

Members of the judicial system argue the impact that exclusions of minorities have on sentencing, but many agree that the practice has a wide-ranging impact on the appearance of justice in Dallas County.

The threat of an all-white jury prompts some black defendants to waive their right to a trial and seek a plea bargain, lawyers say; other defendants change their pleas after learning that their jury contains no member of their race.

"Black people don't like to go to trial, regardless . . . They don't believe they're going to get a fair trial from white people," explained defense lawyer Carl Gaines, the second black prosecutor hired by Wade.

Nor does the impact of black exclusion stop with defendants. Blacks called for jury service say the absence of blacks on juries causes them to question whether the judicial system is color-blind.

Many families of defendants leave the courtroom believing they have witnessed "white man's justice," said Peter Lesser, a defense attorney and a Democratic candidate for district attorney.

"I think that hurts the judicial system because then they're not concentrating on the fact that Johnny is a no-good scumbag who beat up this old lady, stole her purse, put her in the hospital and nearly killed her," Lesser said. "They're concentrating on the fact that, well, it's racist."

Jessica Guillory was one of nine black potential jurors summoned in February for a case involving a black woman charged with welfare fraud. Mrs. Guillory said she felt intimidated after watching the panel reduced to an all-white jury.

"It made me know that I better not ever get in trouble, that I don't feel like justice is all it's supposed to be," said Mrs. Guillory, one of six blacks dismissed by the state.

Baraka said blacks have been so conditioned to expect unfairness from the justice system that many do not consider jury service a possibility.

"As a defendant, we don't stand a chance. We're arrested more often, we're convicted more often, we receive more punishment. I mean, those are just the facts," Baraka said. "And as honest, law-abiding citizens who believe in God and the American way and pay taxes to send our children to school, we're still told we're not anything of value."

West, a defense attorney, said that even black professionals contemplate ignoring a jury summons, believing that because of their race, their opinions are not wanted by the

justice system. "There's no sense going down there (to the courthouse) because they're going to strike them just because they are black," West said.

Still other blacks have a more visceral reason for avoiding jury service, according to state District Judge Ed Kinkeade, who oversees operation of the central jury pool.

"They tell me, "I'm afraid of the courthouse; nothing good happens at the courthouse, and I don't want to be a part of it," Kinkeade said.

Racial discrimination in jury selection in Dallas County dates back at least to the 1930s when riots narrowly were averted after blacks appeared at the courthouse, insisting they be considered for jury service. In 1938, a black college president was thrown head-first down the courthouse steps by two white men when he refused to leave the central jury room.

In the 1940s, the U.S. Supreme Court, in three separate cases, told Dallas County that its method of selecting grand jurors was unconstitutional because it intentionally excluded blacks.

Evidence presented to the Supreme Court in one Dallas case in 1942 showed that no black ever had served on the Dallas County grand jury. Two grand jury selection officials said they had not summoned any blacks because they knew of no qualified black in the county, which then had 55,000 black residents.

The law was then the most common form of exclusion. Most blacks were simply disqualified from jury service because, in order to be an eligible juror, a person must have paid a poll tax—a required fee for voting—and be a property owner.

Blacks who did qualify for jury service in Dallas County were rarely served with summonses; those who were served and appeared at the courthouse frequently were told by judges that their services were not needed.

Not until 1949 did a black serve on a trial jury in Dallas County, 81 years after blacks were granted full rights as citizens by the 14th Amendment to the U.S. Constitution.

When Wade took office as district attorney in January 1951, he said, he made it a priority of his office to prosecute more crimes against blacks, because of the higher crime rate in predominantly black neighborhoods. That policy has remained a priority ever since, Wade said.

However, Wade said he has never had a policy of preventing blacks from serving on juries and has seated blacks on juries as far back as the 1950s.

But state District Judge Jack Hampton, who served on Wade's staff from 1958 to 1962, recalled being reprimanded by Wade when he allowed a black woman to serve as a juror on a misdemeanor drunken driving case. The case ultimately ended in a mistrial because the woman could not reach a verdict.

"If you ever put another nigger on a jury, you're fired," Hampton quoted Wade as saying. "That was the way things were back in 1958."

Said Wade: "That didn't happen, so far as I'm concerned."

Hampton said he did not put another black on a jury for the remainder of his career as a prosecutor.

Five years later, a treatise on jury selection credited to Assistant District Attorney Bill Alexander, then one of Wade's top aides, reiterated the belief that certain minorities were not appropriate state's jurors.

"Do not take Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury, no matter how rich or how well educated," Alexander advised prosecutors. "I may like these people, but they will not do on juries."

Alexander, now a federal prosecutor in Dallas, said he accepted blacks as jurors when he was in Wade's office and does not remember writing the treatise that advised against selecting minorities. "I just won't take responsibility for that," he said.

In 1963, when the treatise appeared, the number of blacks appearing for jury duty remained small. But by the end of the decade, that number was increased significantly with the abolition of the state poll tax in 1966 and the advent of a new law designating voter registration lists as the source lists for juries.

It was then, according to defense lawyers, that prosecutors began in earnest to exercise their peremptory challenges against blacks.

In 1969, Sparling, then an assistant district attorney, delivered what became a highly publicized speech to a training session for prosecutors. Sparling's suggestions on jury selection, in fact, were the subject of a Time article in 1973 that carried the headline: "Women, Gimps, Blacks, Hippies Need Not Apply."

In addition to minorities, Sparling's recommendations warned against selecting "free-thinkers" people with physical afflictions and the overweight—especially women and young men.

Wade and his assistants maintain the Sparling manual never was followed blindly and never has been read by most current prosecutors. They insist that prosecutors are trained to 711 make individual decisions on jurors based on a combination of demographic factors and personal observations.

"Why do I want 12 white people on a jury when one of them is a person who's been unemployed for a while or not much of a work record, and came to court without a coat and tie, and you struck this young black business executive just because he was black?" said Jerry Banks, formerly one of Wade's top assistants. "That's dumb."

Any prosecutor who allowed his racial prejudices to interfere with his judgment in selecting the best possible jury, Banks said, would not have lasted long in Wade's office.

Defense lawyers claim that prosecutors with the least experience are the most likely to rely on stereotypes handed down by more experienced prosecutors.

"If Douglas MacArthur wrote his memoirs on the campaign in the South Pacific and you wanted to be a great general, what would you do?" asked Aguire, a former prosecutor. "If you're an inexperienced prosecutor, you do what the old master says."

The process of culling black jury candidates is apparent almost every Monday in the Dallas County Courthouse. Dozens of blacks, along with other potential jurors, enter the central jury room and later are sent to a felony court for jury questioning. But when the jury is seated, blacks more often than not are left sitting in the audience.

Inside the courtroom, prosecutors commonly exercise peremptory challenges against blacks who voice similar views and appear to possess similar qualifications to whites who are selected on the jury.

The News witnessed prosecutors repeatedly dismissing black professionals in favor of blue-collar whites, even though the whites may not have lived in the county as long. The practice was particularly pronounced when the defendant was black.

Selecting a jury, lawyers agree, is part gamesmanship and part psychology, with each sides attempting to guess how the other will use its 10 peremptory challenges to sculpt a jury of people most inclined to favor its side of the case.

And while the intent behind the law allowing peremptory challenges is to obtain an impartial jury by eliminating signs of partiality, lawyers on both sides scoff at the notion that fairness motivates their use of the challenges.

"Anybody who tries to sugar-coat it by talking about fairness and justice and equality is just talking through his hat," said defense lawyer Mel Bruder. "We want people who are going to look at that case with prejudiced eyes."

The means of identifying potentially hostile jurors can be as straightforward as listening to candidates' responses to questions, or as subtle as observing the quickness of the person's gait or the style of his hair.

Stereotypes, superstitions and instincts are integral parts of the selection process, lawyers admit, because of the limited time available to question potential jurors and the sparse biographical information provided on each candidate.

Opinions on whom to exclude are not scientific.

Alexander, one of Wade's former top assistants, for example, promulgated a policy that came to be dubbed "The Alexander Rule." It advised prosecutors to exclude any person whose profession begins with the letter "p"—including plumbers, painters, prostitutes and pimps. Alexander also advised against selecting "Yankees . . . unless they appear to have common sense," "queers" and "anyone who has ever lived in California."

Defense lawyer Tom McCorkle, a native of Highland Park, said he habitually uses peremptory challenges on persons belonging to any group "I loathe."

"Republicans and people from the Park Cities, my own flesh and blood, you know, I wouldn't have on a jury," McCorkle said. "I'm prejudiced about that, have bad feelings about them."

Other defense lawyers say they routinely use their peremptory challenges to exclude police officers, retired military personnel, bankers and Lutherans, all of whom traditionally are viewed as prosecution-oriented. They say they look for open-minded people and "virgin jurors" untainted by exposure to the judicial system.

Prosecutors, on the other hand, say they look for conservative people with a stake in the community. Indicators of stability, they say, are a person's job, his family makeup and his personal appearance.

The current instructional manual given prosecutors by the Texas District and County Attorneys Association suggests that it is not advisable to select potential jurors with multiple gold chains around their necks or those who appear to be "free thinkers."

What distinguishes defense practices from prosecution practices, according to defense lawyers, is that prosecutors

use their legally constituted peremptory challenges to accomplish an illegal result—the disenfranchisement of blacks from jury service and the perversion of the guarantee of a jury of peers.

The result, they maintain, is that justice is skewed because an entire segment of the community is prevented from voicing its opinions on what constitutes justice in any individual criminal case.

The absence of blacks, lawyers say, deprives juries of a variety of perspectives and insight into human behavior, sometimes forcing white jurors to rely on stereotypes and biases in determining the fate of defendants.

"They are incapable of empathizing and unlikely to sympathize," defense lawyer Tim Banner said of all-white juries. "They haven't lived inside a black skin. They don't know what it's like."

The racial composition of a jury can be particularly critical in cases in which the state's evidence is primarily circumstantial, such as the identification of eyewitnesses.

Defense attorney Ed Sigel represented E-Systems engineer Lenell Geter in a celebrated armed robbery case that raised the specter of racial prejudice in the Dallas County's justice system. Sigel contended that white witnesses had more credibility with Geter's all-white jury than Geter, a black.

Every black eligible to serve on Geter's jury was dismissed by prosecutors, Sigel said.

"What they thought was, Geter was just another black young fellow that was out robbing," Sigel said. "There's no question in my mind that if he were a white engineer, they would not have dealt so harshly with him and they probably would not have found him guilty. They would have listened to the evidence."

Geter was found guilty of armed robbery and sentenced to life in prison. However, he was released after the district attorney's office agreed to give him a new trial, based on allegations of irregularities in his trial. Ultimately, all charges

against Geter were dropped, after eyewitnesses identified another black man as the robber.

Racial makeup also can affect the tone of deliberations.

Defense lawyer Ron Goranson recalled a recent trial in which he defended a black man accused of murder, and overheard one member of the all-white jury discussing potential punishment for his client.

"Look, I already agreed with you not to find the nigger guilty of murder," Goranson quoted the man as telling his fellow jurors, "but I'm not going to let you talk me into giving him probation."

Opinions about the effects of a jury's racial composition on the verdict rendered are almost as varied as the opinion-givers. Some defense lawyers contend all-white juries tend to punish black defendants more severely; some say white juries are not as tough, particularly in crimes among blacks.

Most judges say juries, regardless of the racial makeup, almost always "do the right thing."

Texas criminal case law shows that few cases have raised the issue of race-biased jury selection on appeal. In cases that have raised the issue, state appeals courts did not find reversible legal error. Those cases that have been overturned have been reversed by federal appeals courts.

Trial court judges acknowledge that the practice of prosecutors excluding blacks is common, but they contend that they have no authority to interfere with the exercise of peremptory challenges.

"A judge has no role in directing the prosecutor or the defense lawyer to do their peremptory challenges, or not do their peremptory challenges, in a particular manner," state District Judge Richard Mays.

Kinkeade and Baraka, however, said judges can prevent systematic exclusion through informal means by telling prosecutors they will not tolerate such behavior.

Last year, for example, Baraka barred one prosecutor from selecting juries in his court, he said, when the lawyer

did not give an adequate reason for excluding all black members of a jury panel.

In more than a dozen trials in Dallas and elsewhere in the state, The News observed only one defense lawyer complain about jury selection being racially biased. The lawyer, John Stauffer, complained that prosecutors denied his client a jury of her peers by dismissing all eligible blacks from the jury panel.

"This is not due process, it is not constitutional, it is against God," Stauffer said after the trial.

No lawyer representing a black defendant questioned potential jurors about possible race bias before a jury was selected.

Defense lawyers in the trials said they did not raise the race issue because they did not want to anger the jury panel and because they said they did not believe even the most racist person would admit his bigotry.

But other lawyers said they consider it critical to ask prospective jurors whether the defendant's race will affect their ability to be fair. Some lawyers say that merely raising the issue can defuse racist tendencies in jurors.

"If you have a black defendant and a white complaining witness and you don't ask about racial prejudice, you ought to have your bar card jerked that very day," said defense lawyer Richard Corbitt. "I think it's malpractice."

Still other defense lawyers say that while they do not approve of the way prosecutors exclude minorities with peremptory challenges, they do not want to risk losing their ability to dismiss whomever they choose.

"It goes back to the old, old quote out of the (Texas) Court of Criminal Appeals. He may strike as many blows as he wants but they must be fair blows," said Bruder, a Dallas defense attorney.

"And if all he (the prosecutor) is doing is striking blows for the state by excludo I don't think are going to do a good job for my client—I'm in a hard position to criticize him for it," Bruder said.

Baraka said racially discriminatory jury selection is not strictly a legal issue. "Morally, it's wrong because black people are people, and they pay these people's salaries with their tax dollars.

"They (prosecutors) are supposed to be protecting the interests of all citizens. And how can they protect their interests if you won't take them into the system?"

Defense lawyer Henry Ackels noted that laws can change.

"It wasn't until 1963, 175 years after the Constitution was adopted, that the courts said everybody has a right to have a lawyer . . . . It wasn't until *Brown* v. *Board of Education* that the courts decided everybody had a right to an equal education," Ackels said.

"Sometimes, it takes 200 years before we start waking up to a constitutional right that we've had all the time."

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1-2 CHARTS (Credit: The Dallas Morning News Source: Based on a News analysis of 4,434 prospective jurors called for potential service in 100 felony trials in 1983-84. The 100 trials were chosen randomly.) 1. HOW DALLAS COUNTY JURIES BECOME VIRTUALLY ALL-WHITE RACIAL MAKEUP OF DALLAS COUNTY TRIAL JURIES **PHOTOS** 1. Jon Sparling (No credit given) 2. Larry Baraka (No credit given) 3. District Attorney Henry Wade denies that his assistants use race as the sole factor in excluding people from juries. (Credit: The Dallas Morning News) 4. Robbery charges against Lenell Geter were dropped in 1984 after he served 16 months in prison. Prosecutors had dismissed all of the black prospective jurors before his trial. (Credit: The Dallas Morning News/David Woo).

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NEWS

A PATTERN OF EXCLUSION Blacks rejected from juries in capital cases

Series:

DISCRIMINATION IN JURIES

Ed Timms, Steve McGonigle

1986, The Dallas Morning News

For all 15 men tried for capital murder in Dallas County since 1980, prosecutors got what they wanted: the death penalty and overwhelmingly white juries.

Of the 180 Dallas jurors who condemned those men, only five were black. There were 57 other blacks legally qualified to serve on the juries, but prosecutors barred 56.

The prosecutors' use of peremptory challenges—dismissing potential jurors without having to give a reason—meant that nine of every 10 blacks qualified for the capital murder juries were excluded. That pattern of racial bias, widespread throughout Texas, is described by one black former prosecutor as "the most dangerous kind of discrimination, because it is oftentimes camouflaged with legal cliches."

Prosecutors say blacks routinely are excluded from juries because many are soft on defendants, perhaps as a result of their historical distrust of the criminal justice system.

Such exclusion in Dallas County meant that four of the five blacks sent to death row were tried by all-white juries. Two of those, in fact, Larry Smith and Michael Wayne Evans, were executed by lethal injection this year after twice being tried and convicted by all-white juries.

The only black allowed to pass judgment against another black was one who told prosecutors that Texas' form of execution—lethal injection—was too humane. "It's too quick," he testified. "They don't feel the pain."

These are among the findings of an ongoing investigation by The Dallas Morning News examining jury selection in Dallas and 14 other Texas counties. The analysis included a review of the records of 133 of 232 inmates on death row as of Aug. 1.

The 15 counties, which accounted for almost 60 percent of inmates on death row, represented major geographic regions and included the five largest metropolitan areas in the state. In counties whose black population amounted to at least 10 percent, the investigation also found evidence of racial discrimination in jury selection.

In Dallas County capital murder cases since 1980, blacks had a 1-in-12 chance of being selected as jurors, compared to a 1-in-3 chance for whites and a 1-in-4 chance for Hispanics.

Capital cases, which carry mandatory life sentences or the death penalty, are limited to murders of law enforcement officers or slayings committed in the course of certain other felonies, including robbery, rape and kidnapping.

Several legal experts and community leaders say the findings show that peremptory challenges are being used by prosecutors as tools of discrimination against defendants facing the most visceral decision of criminal justice—execution.

Frank Williams, criminologist with the Criminal Justice Center at Sam Houston State University in Huntsville, analyzed The News' findings. The probability that blacks were eliminated by chance is "1-in-10,000," he said.

State District Judge Larry Baraka, Dallas' first black felony prosecutor, said The News' findings reaffirm his conclusion that race is the primary reason prosecutors use peremptory challenges to bar blacks.

"Knowing Dallas County and knowing the DAs' practices, I know that's what they're doing."

Jack Boger, assistant counsel for the NAACP Legal Defense Fund, said the findings establish a pattern:

"The minority community is being told that it doesn't count as much in the criminal justice system. . . . They certainly don't count as jurors and they're being told they need

not apply, or if they apply, they will not be, in effect, hired as jurors."

In a series of articles published last March, The News documented virtually the same pattern of discrimination in 100 randomly selected felony trials in Dallas County.

In April, a landmark U.S. Supreme Court decision, *Batson . Kentucky*, prohibited the use of peremptory challenges in a racially discriminatory manner, saying such practices undermined "public confidence of our system of justice." In a concurring opinion, Supreme Court Justice Thurgood Marshall cited The News' findings as an example of "systematic exclusion" that violated the 14th Amendment guarantee of due process under the law.

Henry Wade, Dallas County's district attorney for 36 years, said he did not know the specific reasons his prosecutors excluded blacks in capital cases. Wade speculated these blacks were not seated as jurors because prosecutors believed them to be sympathetic toward defendants.

Wade said his office has tried to impanel more blacks on juries in the past five to 10 years. "But I don't believe in putting someone on there just because he's black," Wade said. "I want someone on there who's going to vote for the state."

Assistant District Attorney Norman Kinne, who has tried 11 capital cases, more than any other prosecutor on Wade's staff, suggested that most blacks were excluded because they expressed reservations about the death penalty.

Kinne said prosecutors have not intentionally selected all-white juries. "It's just the way things fell," he said.

While The News' analysis revealed a pattern of prosecutors barring blacks, blacks themselves also shoulder some of the responsibility for the prevalence of all-white juries in capital cases.

Potential jurors in capital cases are screened individually by both prosecutors and defense attorneys. If during the questioning, they state they cannot be impartial, the judge dismisses them for "cause." After screening, each side

has 15 peremptory strikes that allows it to cut potential jurors without explanation. The first 12 remaining are impaneled as jurors.

In Dallas County, blacks are three times more likely than whites to be excused for cause after saying they cannot assess the death penalty, The News' inquiry showed.

In Harris County, only 8 percent of the jurors in capital cases were black. But blacks there were more likely to hear the cases of other blacks; 65 percent of black defendants had at least one peer on his jury, by far the highest percentage among the 15 counties examined by The News.

Almost 80 percent of the black inmates on death row from the remaining 14 counties faced all-white juries.

"Never in the history of the state of Texas has a white person been sent to death by an all-black jury," said Harris County Justice of the Peace Al Green, president-elect of the Houston branch of the NAACP. "It has never been done. . . . . Somehow we've come to accept the notion that it's all right for a black defendant to be put to death by an all-white jury."

John Fearance and Ronald Curtis "Buffalo" Chambers are two of the three surviving black inmates on death row from Dallas County. Counting retrials, both have been tried and convicted twice by all-white juries.

"There's no justice to it," Fearance said from behind a heavy mesh screen at the Texas Department of Correction's Ellis I Unit near Huntsville. Fearance was convicted of the 1978 stabbing death of an East Dallas man while burglarizing his house.

"They have their mind made up," he said. "They've already tried you before they've actually tried you."

Chambers, on death row for the 1975 slaying of a Texas Tech University student during an abduction-robbery, said prosecutors didn't want to take a chance at justice.

"You're sitting there and you start seeing only white people going on the jury, right? Well if you're a black dude, and you see all these white people that are going to be on

your jury—the judge, too—you want somebody who can under stand you."

Houston lawyer Percy Foreman has, by his own estimation, tried more death penalty cases than anyone. He believes that, given the same evidence, a black is more likely to be sentenced to death than a white.

The reason, Foreman asserts: "Racial prejudice on the part of the jurors."

Beaumont lawyer Gaylyn Leon Cooper, the first black felony prosecutor in Jefferson County, believes black jurors mitigate racist impulses.

The black juror won't go in and say, "'Well, you know how these people are,' or 'I'm afraid of these people,'" Cooper said.

Minority representation on capital murder juries also is seen as a way to ensure that mitigating circumstances are at least considered.

"If you're in a death penalty case and you've got a black kid who grew up . . . in the ghetto, and was fatherless, and you've got 12 middle-class, white jurors, you've got nobody on that jury who by definition can identify with your client," said Dennis Boskey, former legal director of Southern Poverty Law Center in Montgomery, Ala.

State Sen. Craig Washington, a Houston defense lawyer, said the secret deliberations of 12 white jurors sends a negative message to the minority community.

"If I'm outside the door when the decisions are being made, I'm suspicious of the decision," Washington said. "If you're being fundamentally fair and your decision is right, then you shouldn't mind me watching it being made."

The Re. Zan Holmes, pastor of Dallas' St. Luke Community Methodist Church and a former Texas legislator, said blacks more often are crime victims than whites. "Blacks have a lot at stake in the criminal justice system and want to see justice done."

For more than 20 years, the same U.S. Supreme Court decision that condemned the use of peremptory challenges "to deny the Negro the same right to participate in the administration of justice," in practice gave prosecutors free rein.

Defense lawyers complained that Swain v. Alabama demanded an unattainable standard of proof; the ruling permitted the use of peremptory challenges in individual cases, and required documentation of system-wide discrimination.

But under the guidelines of the Batson decision in April, if a defense lawyer shows evidence of "purposeful racial discrimination" during a single trial, prosecutors can be compelled to prove they didn't use their peremptory challenges solely to exclude blacks.

The debate now centers on the application of Batson in actual courtroom situations. Prosecutors say it contradicts the traditional intent, which allowed a person to be excused without explanation.

Defense attorneys contend the ruling can easily be circumvented.

"A lot of time is going to be wasted because the prosecutor can always come up with some other reason that would appear equally valid," explained Houston lawyer Donald W. Rogers Jr.

There is a wide gap between knowing peremptory challenges are being used racially and proving it, according to John Paul Davis, Jefferson County's first black prosecutor and now a municipal judge in Beaumont.

"The subtleties of discrimination within the criminal justice system are the most dangerous kind of discrimination, because it is often times camouflaged with legal cliches," he said. "Lawyers can always use one word when they want to use another."

However many lawyers believe Batson can be used to curb prosecutors' use of peremptories along racial lines.

"A good, articulate prosecutor who actually chooses (jurors) on methods other than race will have no problem with Batson," said Dallas lawyer Richard Alan Anderson. "If you've got a prosecutor who's obviously choosing on a racial basis and is just trying to make excuses to justify that ... then you're going to catch those folks."

University of Iowa law professor David C. Baldus, a nationally known expert in capital murder trials, suggests that lessons learned in job discrimination suits might be applied to jury selection.

In those cases, employers have been found liable for rejecting minority job applicants whose lawyers proved they had the same characteristics as whites who were hired.

Prosecutors who have been successful after picking all—white juries are not likely to change their formula. And that formula, many defense lawyers claim, was etched in an era of segregation and passed blindly to a new, more enlightened generation that nevertheless is practicing age-old discrimination.

"The practice that's been going on in that courthouse ever since I've been involved in it—as both a prosecutor and a defense attorney—is that you just don't question success," said Brad Lollar, president-elect of the Dallas County Criminal Bar. "They've been picking their juries that way forever . . . and it's always worked."

Lollar, a Dallas County prosecutor for four years before going into private practice, said no one "necessarily . . . came up to me and said directly, "Don't take a black on a jury." It wasn't that obvious.

"What we were told to do was go around and watch how the experienced prosecutors did things. And it didn't take a Rhodes scholar to figure out that one thing they were all doing was excluding minorities from the jury."

For Houston lawyer James Stafford, who has appealed the selection of an all—white jury in a capital murder case, the irony is that many blacks eliminated are "probably a lot stronger state's jurors than some of the white people."

While The News' study showed a higher percentage of blacks on Harris County capital murder juries than on Dallas juries—8 percent versus 3 percent—prosecutors there nonetheless used peremptory challenges to strike more than 90 percent of the black potential jurors.

Harris County District Attorney Johnny Holmes said his prosecutors do not use peremptory challenges solely because of race, but added: "I don't know if we can divorce race from individual philosophies of the potential juror."

Holmes argues that many blacks perceive the judicial system still tainted by historical experiences of racial prejudice and injustice.

"I still get a rap sheet every now and then on a black defendant and somewhere earlier in his arrest career, it shows "black man walking in a white neighborhood." Now, when you have been subjected to that, or you know people who have, or your family members have . . . it makes one a little bit skeptical of the system."

And that skepticism, Holmes said, might be reflected in "some type of turn-the-other-cheek punishment" for a capital murder defendant.

Houston lawyer Carolyn Garcia, who has handled the appeals of several death row inmates, disagrees. She points out that blacks who are removed with peremptory challenges already have sworn they can follow the law. And she fears that the exclusion of blacks from juries is creating yet another disenfranchised generation.

"You can never get off the treadmill of negative experiences," she said. "The only way to break that cycle is to invite those people into that system."

Dennis Boskey, a Montgomery, Ala., lawyer who specialized in capital murder cases, described Holmes, position as a form of double jeopardy.

"You're saying, 'Well, we beat you over the head then and now we're going to kick you off the juries because we beat you back then'" Boskey said.

The search for the ideal juror frequently leads prosecutors and defense lawyers along different routes. They look at a disparate assortment of intangibles to guide them, from how a potential juror looks and how much money he makes to the kinds of books he reads.

"You want a guy with roots in the community," explained Kinne, who teaches other Dallas County prosecutors how to select juries in capital murder cases. "Usually he has some sort of responsible position that he's held for a number of years. None of his close family or friends has been involved in crime or spent time in the penitentiary. He has a basic understanding of the law . . . and doesn't have any disagreement with any of the law."

Dallas defense attorney Mike Byck, who defended Chambers and two others on capital murder charges, says each side has its own criteria for jurors.

"The district attorneys want a bunch of jack-booted, marching fascists to sit on a capital murder jury," Byck said. "I want a bunch of yuppie, knee-jerk, no-backbone liberals to sit on my jury because I don't want them to kill my man. They want them to kill the guy."

Jurors on Texas capital cases once were required to swear that the potential outcome—either death or life imprisonment—would not affect their deliberations. Those who could not were excused from jury duty for cause.

But in 1980, the U.S. Supreme Court ruled that only individuals who say they cannot assess the death penalty under under [sic] any circumstances can be excused for cause. The case, Adams v. Texas, involved a Dallas County defendant tried for killing a police officer.

In Adams, Supreme Court justices concluded: "To exclude all jurors (for cause) who would be in the slightest way affected by the prospect of the death penalty ... would be to deprive the defendant of the impartial jury to which he or she is entitled under the law."

Some legal scholars, as well as Supreme Court Justices William Brennan and Thurgood Marshall, claim prosecutors

are abusing the same constitutional rights protected in Adams.

Brennan, in a recent dissenting opinion, wrote that using peremptory challenges to exclude everyone with reservations about capital punishment creates a "hanging jury."

Many blacks in Dallas express some reservations about the death penalty, yet are kept in the jury pool after saying they could assess death in some circumstances. Kinne said those potential jurors are the ones prosecutors are told to strike with peremptory challenges.

"We teach (prosecutors) that if someone expresses doubts about his ability to follow the law, then you get rid of him,' Kinne said. "If it turns out that they're black, that's just how it falls."

Dallas lawyer Royce West, a black former prosecutor and recent Democratic candidate for district attorney, said he doubts Kinne's explanation of why blacks have been excluded.

"I know, based on my experience not only as a prosecutor but as a defense lawyer, that black people are just as interested in justice and making sure that individuals who don't belong on the street stay off the street."

A review of trial transcripts in the 15 Dallas County capital cases showed that 33 of the 56 blacks struck by prosecutors voiced reservations about the death penalty. The remaining 23 stated that they could access the death penalty.

Beneath the exacting legal minutiae, the criminal justice system is fueled by the same stereotypes held by the community at large.

In a 1969 speech that later was incorporated into a statewide training manual for prosecutors, former Dallas County Assistant District Attorney Jon Sparling emphasized that minorities "almost always empathize with the accused" and do not make good jurors.

That perception, says defense lawyer Byck, is evident today in prosecutors' jury selection in capital cases.

"I get the impression that they use a racial stereotype much the same, and literally it almost comes out of the Jon Sparling manual where blacks, Jews, well-educated women are too sensitive, too equivocating, too whatever to put on a capital murder jury," Byck said.

Gaynelle Jones, a black Harris County felony prosecutor, said eliminating people who aren't likely to be receptive to the prosecutor's case—regardless of their race—is just common sense.

"I just can't see myself stacking the cards against me," said Ms. Jones.

Said John Paul Davis, the Jefferson County municipal judge: "I do believe to some extent blacks tend to be more inclined not to be spoonfed by the prosecution. They tend to be a little more independent. . . . In fact, I think that makes them more valuable on a jury."

Davis said that while blacks are chosen for some juries, they are "habitually excluded from juries when blacks are defendants, which smacks of the fiercest kind of racism."

Of the four death row cases from Jefferson County examined by The News, one inmate is white, the others black. The News' analysis showed that one black juror was impaneled in the white defendant's trial; the three blacks were sentenced to death by all-white juries.

"We look at who will enforce the law as we see it, and who won't,' said Jefferson County District Attorney James S. McGrath. "More blacks, through my experience, would be against, or weaker on, the death penalty than other groups. We may be influenced to that extent."

However, McGrath said, his prosecutors never have "systematically excluded" any ethnic or racial group.

"We're cognizant of the fact that certain groups of people make the best jurors," he said. "If you want a fine jury, get yourself 12 Germans on there, and you're going to fly. Statistically, German people are more strict in law enforcement than any group that we know of." Beaumont lawyer

Cooper, a former assistant on McGrath's staff, said he was never told not to let blacks on a jury, but felt some pressure.

"Any time a jury came back with what was less than considered to be the appropriate punishment from a prosecutorial point of view, then a reason had to be attached," he said. "And I might be asked, "How many blacks were on the jury?"

John Vance, who will succeed Wade Jan. 1 as Dallas County district attorney, said he intends to record the race of each prospective juror in felony trials, and will personally question any prosecutor whose use of peremptory challenges appears to be racially motivated.

In Tarrant County, a written policy prohibits the systematic exclusion of minorities from juries. Juries that convicted four to death row were examined by The News—three were allwhite, the fourth, which convicted a black defendant, included one black juror.

Tarrant County District Attorney Tim Curry said many minorities are "weak on capital punishment' and excused with peremptory challenges for that reason.

Dallas lawyer Mel Bruder, who represented Randall Dale Adams, the defendant in Adams, notes that peremptories also eliminate individuals who won't be fair to the defendant, and warns against too vigorous an attack on their use.

"If you don't like them because they're being used in some discriminatory manner, then they'll have to be abolished," Bruder said. "And I think that would be a greater disservice to the defendants than having them, and allowing the state to strike people who are ... weak."

Prosecutors argue that their first responsibility is to get a conviction and find the jurors who will give it to them.

Troy Woods was the only black juror in the 15 Dallas County capital murder trials involving a black defendant. His views on the death penalty were unwavering during jury selection.

"What I call punishment is back to the old Indian days," he said. "Pour some honey on them and stake them out over an antbed.... That's what I call punishment."

Woods, 46, was a juror in the trial of Thomas Joe Miller-El, who was sentenced to death in March for the robbery-murder of an Irving motel clerk.

By the time a trial begins, said Holmes, the Houston district attorney, "We've resolved any doubt about the guilt of the accused in our hearts—this is a guilty son of a bitch and we're trying to find somebody who's going to put him in the pen."

Sammie Lee Parker was one of four blacks whose opposition to the death penalty kept him from serving on the all-white Dallas jury in 1985 that tried Ronald Curtis Chambers and sentenced him to death.

"I guess the main reason that I'm against the death penalty ... is maybe 80 or 90 percent of the time there is a black man involved," Parker testified.

"I am not defending them, because I know we do wrong like everybody, but I think the black man normally gets the tail end of (the) deal."

Parker's view is shared by many who claim that blacks historically have received harsher treatment from a jury system that has excluded them.

For that reason, many blacks mistrust the legal system. Almost half the blacks summoned for jury service in Dallas County were excluded by the judge because of their stated opposition to the death penalty.

"Minorities correctly realize . . . that they have little chance at the courthouse, or at least that they're running behind," said Corpus Christi lawyer Doug Tinker, an authority on jury selection in capital trials. "They go down there and they're scared to death. They're like a rabbit in the headlights of a car."

George C. Wright, director of Afro-American studies at the University of Texas, believes blacks and whites see the

law differently: "The whites see the law as the protectors. Black people see it as the oppressor."

In 1924, when Texas began using the electric chair for executions, the first four inmates seated—all in one night—were black. From 1924 through 1964, 504 defendants were sentenced to death; 63 percent of the 361 defendants actually executed were black.

The last to die in the Texas electric chair—on July 30, 1964—was 27-year-old Joseph Johnson Jr., a Houston black convicted of murder.

Because of several factors, executions in Texas were interrupted from 1964 to 1981: anticipation of a U.S. Supreme Court ruling on the constitutionality of the death penalty; a sweeping 1972 Supreme Court decision that overturned potentially discriminatory state laws; and appeals that tested Texas' capital punishment law passed in 1973.

On Dec. 7, 1982, in Huntsville, Charlie Brooks Jr., a Fort Worth black convicted of killing a car dealer, became the first inmate to be executed by lethal injection in the nation.

Fort Worth lawyer Danny Burns unsuccessfully appealed Brooks' conviction, arguing that the Texas death penalty was "a disproportionately severe and excessive punishment ... being imposed pursuant to a pattern of racial, economic, and sexual discrimination."

Statewide application of the death penalty echoes the pattern in Dallas County. Since 1924, 17 whites and 40 blacks from Dallas County have been executed.

Five whites and 17 blacks from Dallas County have been executed during Wade's tenure as district attorney. Ten of the blacks were executed before 1964 for what are no longer capital offenses—nine for rape and one for robbery with a firearm.

Gerald Goldstein, general counsel for the Texas Civil Liberties Union, said the attitude among many blacks against the death penalty should surprise no one.

"It should come as no shock to us any more than if we went to Spain after the Inquisition and could find the few Jews left and ask them what they thought," Goldstein said. "I imagine they would have some problems with the system at that point."

Houston lawyer Ron Mock, a black, believes the solution to a cycle of skepticism—one that makes blacks distrust the system and the system mistrust them—can't be written in the law.

"My changes would involve . . . the hearts and minds of people as a whole to see each other as a brother as equal folks under the law," he said.

"Those are the things you'd have to change. You'd have to change ordinary people. That's the problem."

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1. GRAPH (Credit:DMN * Source:DMN) DEATH PENALTY CASES:

RACIAL MAKEUP OF JURIES BY COUNTY 2. CHART (No credit given) RACIAL COMPLEXION OF DEATH ROW INMATES, JURIES 3. PHOTO (Credit:DMN-Jan Sonnenmair) John Fearance looks out of a cage that "dangerous" inmates are kept in during interviews. 4. PHOTO (Credit:DMN-Jan Sonnenmair) Clarence Brandley is on death row after an all-white jury in Conroe convicted him of killing a white girl. 5. GRAPH (Credit/Source:DMN) FEW BLACKS SELECTED FOR DALLAS DEATH PENALTY TRIALS 6. GRAPH (Credit /Source: DMN) POTENTIAL DALLAS DEATH PENALTY CASE JURORS EXCUSED FOR CAUSE 7. PHOTO (Credit:DMN-Jan Sonnenmair * This Photo ran in the BULLDOG Edition ONLY) Calvin Williams, a Houston man on death row, was convicted by an all-white jury. 8. GRAPH (Credit/Source: DMN * This Graph ran in the BULLDOG Edition ONLY) CHANCES OF SERVING IN DALLAS

DEATH PENALTY TRIALS, BY RACE; LOCATION: Graphs-NR. Photos: 1.-2. Oversize Black/White File. 3. Prisons & Prisoners-Texas.

SUPREME COURT OF THE UNITED STATES

THOMAS JOE MILLER-EL,
petitioner,

v.

DOUG DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION.

No. 03-9659
June 28, 2004
Case below, 361 F.3d 849
[124 S.Ct. 2908]

Motion of petitioner for leave to proceed in forma pauperis and petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit granted.

03-9659

Lodging submitted:

September 2, 2004

Material unavailable for filming